Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

JACK MUNARI,

Petitioner,

v.

CITY OF EL PASO DE ROBLES, a municipal corporation, CITY COUNCIL OF THE CITY OF EL PASO DE ROBLES, ROBERT LATA, in his official capacity as Community Development Director of PLANNING DEPARTMENT OF THE CITY OF EL PASO DE ROBLES, STATE OF CALIRORNIA, CALIFORNIA DEPARTMENT OF FISH AND GAME AND DOES 1 through 100 inclusive,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner held an option to purchase undeveloped property in the city, submitting an application for a master plan of the development of the property. The city and the state agencies refused to schedule a public hearing on the merits of the master plan proposal and the adequacy of environmental review until Petitioner executed written commitment to purchase replacement property three times the size of the option property as "replacement" habitat for the a kit fox species which never existed on the property, at a cost of approximately $2,000,000, and provide a permanent endowment for the maintenance of the replacement property, in addition to bonding, and other exactions. The government agencies refused scheduling the public hearings until Petitioner agreed to a series of progressively dire exactions. The city denied the master plan application, and certified the environmental analysis as complying with state law which identified existing zoning as the preferred environmental alternative. As Petitioner submitted a smaller development proposal consistent with the preferred environmental alternative, the city adopted a processing moratorium and Petitioner's options rights expired.

The questions presented are:

1. May state and local government agencies impose agreements for exactions, including the acquisition for public use of other private property, as a pre-condition to scheduling or holding public hearings on development proposals?

2. Do either or both of the two prong ripeness requirements of *Williamson County v. Hamilton Bank* apply to substantive and procedural due process, equal

protection and temporary takings claims under 42 USC Section 1983?

3. Is a writ of mandamus an adequate state law remedy precluding recovery of damages under 42 U.S.C. Section 1983 for procedural and substantive due process, equal protection, and temporary takings violations under the second prong ripeness requirement of *Williamson County?*

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner-Plaintiff-Appellant: Jack Munari.

Respondents-Defendants-Appellants: City of El Paso de Robles, City Council of the City of El Paso de Robles, Robert Lata, in his official capacity as Community Development Director of the Planning Department of the City of El Paso de Robles; the State of California, California Department of Fish and Game.

RULE 29.6 STATEMENT

Petitioner is an individual and resident of the State of California, and no parent corporation or publicly held company owns any interest in the option rights of Petitioner in the property which is the subject of this litigation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jack Munari ("Petitioner") respectfully petitions for a writ of certiorari to review the opinion of the Supreme Court of California denying Petitioner's petition for review, upholding the opinion of the Court of Appeal of California, Second Appellate District, Division Six, in turn affirming the Consolidated Judgment After Sustaining Demurrers without Leave to Amend and Granting Motions for Summary Adjudication entered by the Superior Court of the State of California, in and for the County of San Luis Obispo.

OPINIONS BELOW

The opinion of the Supreme Court of California filed June 8, 2005, is reproduced in Appendix A, infra, 1a. The California Court of Appeal order modifying opinion and denying rehearing [no change in judgment] filed April 18, 2005, is reproduced in Appendix B, infra, 2a-3a. The California Court of Appeal opinion filed March 23, 2005, is reproduced in Appendix C, infra, 4a-19a. The Superior Court consolidated judgment after sustaining demurrers without leave to amend and granting motions for summary adjudication entered October 6, 2003, is reproduced in Appendix C, infra, 20a-53a.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to Article III, Section 2, of the Constitution of the United States, for Petitioner's claims arising under the Constitution and Laws of the United States, 42 U.S.C. Section 1983, the due process, equal protection, and takings clauses of the Fifth

and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTION AND STATUTORY PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States, provides that:

> "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifth Amendment to the Constitution of the United States, applicable to City and State Respondents through the Fourteenth Amendment, provides that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

42 U.S.C. Section 1983 protects Petitioner from city Respondents' actions depriving Petitioner of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States.

STATEMENT OF THE CASE

The state and local government agencies in this case engaged in an oppressive course of conduct which clearly violated Petitioner's procedural and substantive due process rights, equal protection rights, and permanently took and damaged his options rights. They deliberately delayed public

hearings on his development proposal by requiring him to execute a written exaction agreement which would require him to provide to the state agency free of charge other private property three times the size of the property he proposed to develop. Unless he agreed in writing to do so, and to provide the state agency with a permanent endowment to maintain the replacement habitat property, they simply refused to schedule public hearings on his proposals and certification of the environmental impact report for which he paid nearly a quarter million dollars to the city for consultants to complete. This case goes well beyond normal processing delays and typical exactions required for public hearings of any other property owners.

The California state courts have applied the two prongs of *Williamson Bank* ripeness doctrine to dismiss all of Petitioner's substantive and procedural due process, equal protection and temporary takings claims under 42 U.S.C. Section 1983, which were joined with state law equitable and compensation remedies. He was denied standing to pursue his state law remedies on the grounds his options rights had expired, a circumstance caused directly by the unconstitutional conduct of the city and state agencies.

This Petition should be granted to secure a uniformity of decision among the various state courts and various federal circuit courts of appeal regarding the application of *Williamson Bank* ripeness doctrine, and to reverse the clear errors of the California courts in placing unreasonable procedural impediments upon the litigation of Petitioner's federal constitutional and Section 1983 claims.

Factual Background. Petitioner acquired an option to purchase and submit development applications on the Chandler Ranch, consisting 673 acres in the City of El Paso

de Robles, California. The city had entered into a detailed annexation contract in 1980 with the then owners which established the significant future parameters for the development and use of the ranch. The city's land use element defines and distributes the types and intensities of land uses throughout the city, including the property. Prior to obtaining his option rights, the city deleted in 1998 a specific plan requirement for the ranch, which did not contain a moratorium on processing development applications during the preparation of any such plan.

Petitioner applied for a general plan and zoning ordinance amendment for the ranch in 1999 ("master plan application") which the city deemed complete prior to May 24, 1999. California Public Resources Code (CEQA) Section 21100.2 and the State CEQA Guidelines, 14 Cal. Admin Code Section 15108 required the certification of an environmental impact report (EIR) on private development projects must be completed within one year after the agency has accepted an application as complete. Petitioner had to pay for the report's preparation by independent consulting firms, which exceed $240,000, as well as the city's original cost estimates. In order to exercise his option on portions of the property and sell those portions to other possible developers, Petitioner during 2000 applied for and the city approved a re-alignment of existing parcels on the Ranch, thereby increasing its value and development potential. The Draft EIR was published for public comments in June, 2000, and the public comment period closed on August 14, 2000.

Petitioner made numerous requests that the city timely complete the certification of the EIR and hold a public hearing on the master plan proposal. The city refused to schedule any of these public hearings until the Petitioner came to an agreement with the California Department of Fish and

Game regarding providing replacement San Joaquin Valley kit fox habitat acceptable to the state agency.

Petitioner filed a notice of appeal of the city planning director's refusal not to schedule the public hearings on the project on March 22, 2001, since all of his other requests to comply with mandatory time limits had been of no avail. No hearing was ever scheduled on his appeal before the city council.

As the negotiations continued with the state agency and the delays also continued, Petitioner was ultimately required to sign a written mitigation agreement which prior to any development of the ranch, required him to acquire and preserve 1,980 acres of replacement habitat for the benefit of the state agency, with an estimated cost of $1,940,000. The state agency required that Petitioner also agree to provide funds in the amount of $198,000 to establish an endowment for the long-term maintenance of the replacement habitat by the state agency. He was also required to bond or provide other cash security for these obligations before commencing construction of any project he proposed on the site.

At long last, on June 19, 2001 the city council held a hearing on the certification of the EIR and consideration of the master plan proposal. It adopted findings certifying the legal adequacy of the EIR, but denied Petitioner's development plan application. The detailed EIR considered different alternatives and concluded that the city's existing general plan densities and zoning provisions were the superior alternative.

Petitioner then submitted an application for a residential subdivision within one of the reconfigured parcels on the ranch which was consistent with the existing city approved

densities and substantially identical to the alternative approved in the EIR. The EIR had identified detailed mitigation measures to address any potential adverse impacts from the proposed subdivision. During this time period, Petitioner tried to sell portions of the property before his option rights would expire, which would have allowed him to exercise his options rights on the entire property. Any such potential purchasers were told by city officials that as long as Petitioner held any interest in the ranch, the city would not consider approving any development proposals.

The city then amended its general plan to require the preparation of a specific plan for development of the property, which imposed a moratorium on any development applications until such a plan were approved. This moratorium meant that Petitioner's option rights would become valueless, because the city and state agency delays had consumed the entire option period, and obtaining a further option in the face of the moratorium would only increase Petitioner's financial losses; unless he could obtain a state court judgment to set aside the moratorium. After filing litigation in the superior court, his options rights expired but he continued to attempt to extend those rights while he litigated against the moratorium and specific plan requirement.

Petitioner suffers very substantial financial damages as a result of the pattern of unreasonable and oppressive conduct engaged in by the government agencies.

Trial Court Proceedings. Petitioner filed a petition and complaint in the superior court and amended that pleading on February 1, 2002. He plead causes of action for writs of mandamus and/or mandate, declaratory relief, violation of procedural due process under the state and federal

constitutions, violation of substantive due process under both constitutions, violation of equal protection under both constitutions, inverse condemnation under the state constitution, just compensation under the Fifth Amendment, and violation of 42 U.S.C. Section 1983.

The city and state filed demurrers to the amended petition/complaint, and on May 6, 2002, the superior court filed its order sustaining the demurrers without leave to amend to the procedural due process causes of action under the state and federal constitutions on the grounds that the actions were legislative and not subject to procedural due process requirements. App., *infra,* 31a. The superior court sustained the demurrers to the substantive due process causes of action under the state and federal constitutions on the grounds of legislative actions, or alternatively, the lack of any property interest. App., *intra,* 31a-32a. It sustained demurrers to the state inverse condemnation cause of action and Fifth Amendment temporary and permanent takings causes of action on the grounds of lack of ripeness. App., *infra,* 32a-33a. It sustained the demurrer to the Section 1983 cause of action without leave to amend except for the equal protection claims. App., *infra,* 33a.

On May 31, 2002, Petitioner filed a second amended petition/complaint including causes of action for mandate/mandamus, declaratory relief, equal protection under the state constitution, and equal protection/Section 1983 violations. In July, 2002, the city and state filed answers.

On April 17, 2003, the superior court entered its order granting the city's motion for summary adjudication. App., *intra,* 54a-61a. The court rejected Petitioner's mandate/mandamus and declaratory relief challenges to the processing moratorium during the preparation of a specific

plan on the grounds of lack of standing since Petitioner's option to purchase the property had expired. App., *infra*, 57a-59a. The court reject Petitioner's state equal protection claims on the grounds that no monetary relief is afforded under the state constitution, and that he lacked standing to seek equitable relief. App., *infra*, 57a-60a.

The superior court also rejected Petitioner's federal equal protection claims under Section 1983 on the grounds that he failed to challenge by a state mandamus remedy the denial of his master plan, and on the grounds that having lost his option rights, he lacked standing to pursue any damage claims. App., *infra*, 60a-61a.

On July 23, 2003, the superior court entered its order granting the state's motion for summary adjudication. App., *infra*, 42a-50a. The court held that Petitioner's remaining causes of action against the state for declaratory relief could not change the past actions of the state, could not award damages under state or federal law, and that Petitioner's option rights had expired. *Id.*

On October 6, 2003, the superior court entered its consolidated judgment incorporating all of its prior orders. App., *intra*, 20a-24a. Petitioner timely filed notices of appeal concerning all of the superior court rulings.

State Appellate Court Proceedings. The state appellate court's factual findings recognized that while Petitioner's master plan application was pending, he continued negotiations with the Respondent California Department of Fish and Game. The state agency initially required that Petitioner acquire five acres of habitat for every acre included within the master plan area, later rejecting Petitioner's offer

of a one-to-one ratio, but never agreeing to anything less that a three-to-one ratio. App., *infra*, 6a.

The state appellate court's factual findings also recognized that one and one-half years after submitting his master plan application, the state agency,

> "...recommended that the city not certify the EIR until Munari signed a formal mitigation agreement. The city adopted the [state agency's] recommendation and refused to calendar the certification until Munari signed the agreement. On January 30, 2001, Munari wrote to the city protesting its decision. He state he knew of no authority that allowed the city to require a mitigation agreement before certification." App., infra, 6a.

The appellate court found that Petitioner submitted various drafts of the mitigation agreement, and as more time passed, "appealed to the city counsel [sic.] the planning director's decision not to calendar the certification hearing until the mitigation agreement is final." App., *infra.*, 6a-7a. The appellate court's finding omitted the failure of the city to ever schedule for hearing Petitioner's appeal about these delays and exaction requirements to the city council. *Id.*

The state appellate court upheld the trial court judgment. The state appellate court ruled that Petitioner's claims for either a temporary or permanent takings failed on the grounds of ripeness, implicitly on both of the ripeness prongs of *Williamson County v. Hamilton Bank*, *supra*. First, the appellate court held that respondent city had not made a final determination of the extent of permitted development (first prong ripeness). *App., infra*, 9a. Second, the appellate court applied the second prong ripeness requirement to reject

Petitioner's temporary takings claims for delays in scheduling a hearing without written kit fox exactions under *First English Evangelical Lutheran Church of Glendale*, 482 U.S. 304, 96 L.Ed.2d 250, on the grounds his "failure to seek mandate is fatal to his claim for damages resulting from any delay in certifying the environmental impact report." *App., infra,* 10a.

The appellate court rejected Petitioner's takings argument that there "is no rational nexus between the requirement that he sign the mitigation agreement and scheduling a public hearing on the certification of the EIR." *App., supra,* 11a-12a.

The appellate court upheld the trial court's sustaining of demurrers to Petitioner's substantive due process claims on the grounds that the substantive due process claims was essentially a takings claim and subject to the permanent takings ripeness requirements, relying upon *Armendariz v. Penman*, 75 F.3d 1311, 1325-1326. (9th Cir. 1996) *App., infra,* 12a.

The appellate court applied the "same reasoning" concerning the two *Williamson County* ripeness prongs to reject Petitioner's "claim of procedural due process." The court cited no authority to support this single sentence disposition. *App., infra,* 12a.

The appellate court upheld dismissal of Petitioner's equal protection claims based upon this Court's decision in *Village of Willowbrook v. Olech*, 528 U.S. 562, 654, 145 L.Ed. 2d 1060 based upon the imposition of a specific plan requirement. *App., infra,* 18a-19a. However, the state courts did not address the two other aspects of Petitioner's equal protection claims: the requirement that he execute written exaction agreements as a condition of scheduling a hearing on

his master plan proposal and request for certification of the environmental impact report, and the unreasonable delays in scheduling public hearings on the master plan and certification of the environmental document. The appellate court did recognize these claims; but failed to address them. App., *intra,* 12a.

Petitioner timely filed a petition for rehearing with the state appellate court, calling to its attention numerous alleged errors of fact and law. The appellate court modified its opinion to correct some of the factual errors, but declined to change its judgment. App., *infra,* 2a-2b.

State Supreme Court Proceedings. Petitioner timely filed a petition for review of the court of appeals opinion. The state supreme court filed its opinion denying the petition for review on June 8, 2005.

REASONS FOR GRANTING THE PETITION

I. THERE IS A WIDESPREAD AND PERVASIVE CONFLICT OF AUTHORITY AS TO WHETHER THE FIRST AND/OR SECOND PRONGS OF *WILLIAMSON COUNTY V. HAMILTON BANK* RIPENESS APPLIES TO SUBSTANTIVE AND PROCEDURAL DUE PROCESS, EQUAL PROTECTION AND TEMPORARY TAKINGS CLAIMS UNDER 42 U.S.C. SECTION 1983.

In *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), this Court held that a Section 1983 claims for money damages stemming from a regulatory takings of property in violation of federal constitutional rights is not ripe for review of the merits until the plaintiff demonstrates that,

first, a final decision by the relevant authority regarding application of the regulation to the subject property has been made, *i.e.*, the "initial decision-maker has reached a definitive position on the issue that inflicts an actual, concrete injury," 473 U.S. at 193, 105 S.Ct. at 3120 ("first prong ripeness"); and second, that no adequate state remedy, such as inverse condemnation, is available to redress the injury occasioned by the final decision ("second prong ripeness"). *Id.*, at 196-97, 105 S.Ct. at 3122. This Court's rationale is that, absent the state's denial to a property owner of just compensation, there can be no cognizable harm to any federal constitutional right. 473 U.S. at 194 n. 13, 105 S.Ct. at 3121 n. 13 ("The nature of the constitutional right [takings without just compensation] therefore requires that a property owner utilize procedures for obtaining compensation before bringing a Sec. 1983 action.")

This Court left unresolved whether the two-prong ripeness test applied to substantive due process challenges, and because the case did not involve temporary takings, equal protection or procedural due process claims, this Court did not have to decide how ripeness applied to those claims. In the intervening years, there has developed a widespread and pervasive conflict of authority as to whether the first, second, or both ripeness prongs apply to these claims, such that it is now prudential for this Court to address these issues. A consequence of the conflict of authorities is vastly disparate treatment of property owners throughout the nation depending solely upon where they own property on what should be the uniform and predictable protection of constitutional rights secured by the Constitution and laws of the United States.

As the Chief Justice explained in his opinion concurring in the judgment in *San Remo Hotel Llp. V City and County of San Francisco*, 545 U.S. ____ (2005), slip opinion, p. 5:

> "I joined the opinion of the Court in *Williamson County*. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact upon takings plaintiffs is dramatic. ... In an appropriate case, I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based upon the final decision of a state or local government entity must first seek compensation in state courts."

The confused and contradictory application of *Williamson County* ripeness doctrine to substantive and procedural due process, equal protection and temporary takings claims are no less suspect, its impacts upon property owners no less dramatic, and are appropriate for resolution by this Court.

A. There is a Pervasive Conflict of Appellate Conflict within and between the Federal Circuit Courts of Appeal as to the Application of Either or Both Ripeness Prongs to Substantive and Procedural Due Process, Equal Protection and Temporary Takings Claims under 42 U.S.C. Section 1983.

The First Circuit has applied both prongs of *Williamson County* ripeness doctrine to substantive due process claims in the land use context in *Culebras Enters. Corp. v. Rivera Rios,* 813 F.2d 506, 515-16 (1st Cir. 1987). *Cf. Caraballo-Seda v. Municipality of Hermingueros,* 395 F.3d 7 (1st Cir., 2004).

The Second Circuit's opinion in *Southview Associates, Ltd v. Bongartz,* 980 F.2d 84, 96-98, illustrates the possibly gratuitous confusion and perhaps unneeded analytical gymnastics involved in attempting to apply *Williamson County* ripeness to due process and equal protection claims. The court held that a substantive due process claim premised on

the theory that a "regulation has gone too far is subject to both prongs of the *Williamson* ripeness test." *Id.* at 96. On the other hand, a substantive due process claim premised upon arbitrary and capricious government conduct "is subject to only the final decision prong of the *Williamson* ripeness test."

The Second Circuit has opined that in certain circumstances a First Amendment claim emanating from a land use dispute may be subject to first prong ripeness requirements. *Dougherty v. Town of North Hemstead Bd. of Zoning Appeals,* 282 F.3d 83, 90 (2d Cir. 2002). However, the court declined to apply the ripeness doctrine where, as in this case, there was an adequate factual record so that the property owner could do "nothing to further define his injury and had alleged an immediate injury." The application of these principles in this case would lead to the conclusion that the ripeness doctrine should not be applied. The presence of First Amendment issues should not necessarily change the legal principles applicable to Petitioner herein. See also, *Kittay v. Giuliani*, 112 F.Supp.2d 342, 348-49 & n. 5 (S.D.N.Y. 2000) (Parker, J.). *Cf. Kittay v. Giuliani*, 112 F.Supp.2d 342, 348-49 & n. 5 (S.D.N.Y. 2000) .

In *Bello v. Walker,* 840 F.2d 1124, 1127-29 (3d Cir. 1988), the Third Circuit accepted plaintiff's substantive due process claim and rejected his procedural due process on the merits, without finding that either first or second prong ripeness had been satisfied. The state court had denied plaintiff's request for injunctive relief but was not asked to consider state compensation remedies. *Id.* A different result was reached in *Taylor Inv., Ltd., v. Upper Darby Township,* 983 F.2d 1285, 1291, 1292 (3d Cir. 1993), where the court applied first prong ripeness to substantive due process, procedural due process and equal protection challenges to a zoning decision.

In *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 894 (6th Cir. 1991), the Sixth Circuit held that procedural due process claims are not subject to *Williamson County* ripeness requirements. However, in *Arnett v. Myers*, 281 F.3d 552, 561 (6th Cir. 2002), the court analyzed "claims for denial of procedural due process, equal protection and just compensation for takings" under both prongs of *Williamson County* ripeness doctrine.

In *Forseth v. Village of Sussex*, 199 F.3d 363 (7th Cir. 2000), involving a challenge to dedication exactions, the Seventh Circuit noted that although it has recognized the potential for a plaintiff to maintain a substantive due process claim in the land use context, "we have yet to excuse any substantive due process claim in the land-use context from *Williamson*'s ripeness requirements." 199 F.2d at 369. Other Seventh Circuit opinions have also considered in different ways these issues. See *Dougherty v. City of Chicago*, 75 F.3d 348 (7th Cir. 1996); *Harding v. County of Door*, 870 F.2d 430, 431 (7th Cir. 1989); *Polenz v. Parratt*, 883 F.2d 551, 558 (7th Cir. 1989); *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467-68 (7th Cir. 1988). Still other Seventh Circuit opinions have applied *Williamson County* ripeness "with full force to due process claims (both procedural and substantive)", rejecting plaintiffs' procedural due process claims. *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 961 (7th Cir. 2004); *Hager v. City of West Peoria*, 84 F.3d 865, 869 (7th Cir. 1996); *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994); *Unity Ventures v. Lake County* , 841 F.2d 770, 775 (7th Cir. 1988) (applying ripeness to procedural and substantive due process and equal protection claims).

In *Forseth, supra,* however, the Seventh Circuit held that equal protection claims involving the exaction dedication

maliciously inspired "is independent from their takings claim and accordingly, is not subject to *Williamson*'s ripeness requirements." 199 F.3d at 371. See also, *Esmail v. Mcrane*, 58 F.3d 176, 180 (7th Cir. 1995); *Olech v. Village of Willowbrook*, 160 F.3d 386, 387-88 (7th Cir. 1998).

In *Christopher Lake Dev. Co. v. St. Louis County*, 35 F.3d 1269, 1273 (8th Cir. 1994) applied ripeness doctrines to Section 1983 substantive and procedural (*id., n. 5)* due process claims, but not to equal protection claims in land use litigation. In contrast, in *McKenzie v. City of White Hall*, 225 F.3d 313, 318 (8th Cir. 1997), the court held that second prong ripeness did not apply to due process and equal protection claims.

In *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990), the Ninth Circuit applied *Williamson County* ripeness to substantive due process, procedural due process and equal protection challenges. See also, *Herrington v. County of Sonoma*, 834 F.2d 1488, 1494-95 (9th Cir. 1987); *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375, 379; *Norco Construction v. King County*, 801 F.2d. 1143, 1145 (9th Cir., 1986). In other cases, the Ninth Circuit has not applied *Williamson County* ripeness to procedural due process claims. See, e.g., *Sinaloa Lake owners Ass'n v. City of Simi Valley*, 882 F.3d 1398, 1407; *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988); LONGTON'S CALIFORNIA LAND USE, Sec. 12.30[5], pp. 913-914. The inconsistency between the circuits interbreeds with the Second Circuit relying upon the Ninth Circuit opinion in *Sinaloa Lake owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1407 (9th Cir. 1989), cert. denied, 494 U.S. 1016, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990), to support its holding in *Southview Associates, supra*, that second prong ripeness is not applicable to substantive due

process claims based on arbitrary and capricious government conduct.

The inconsistency of Ninth Circuit opinions is demonstrated in the court's opinion in *Traweek v. City and County of San Francisco*, 920 F.2d 589, holding that both prongs of *Williamson County* ripeness "are similarly applicable to appellants' claims for denials of substantive due process, equal protection, and procedural due process", citing *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989). The inconsistencies are further amplified in *Southern Pacific Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 507 (9th Cir. 1990), which held that "as applied" equal protection and due process claims are subject to both ripeness prongs, while "facial" equal protection and due process claims are subject to neither.

In *Landmark Land Co. v. Buchanan*, 874 F.2d 717, 722 (10th Cir. 1989), the Tenth Circuit applied first prong ripeness to a substantive due process claim premised on arbitrary and capricious government conduct.

In *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514, 1516 (11th Cir. 1987), the Eleventh Circuit reversed a dismissal of plaintiff's Section 1983 claims concerning a temporary building moratorium on development finding Florida state remedies inadequate under second prong ripeness. The court interpreted *Williamson County* as articulating, without deciding, that petitioner's claim that the remedy for violation of a property owner's due process rights would include actual damages "where authorized and appropriate." 816 F.2d at 1519, quoting 473 U.S. at 197, 105 S.Ct. at 3122.

In *Greenbriar, Ltd. v. City of Alabaster*, 884 F.2d 1570, 1573 (11th Cir. 1989) the Eleventh Circuit while denying the

substantive due process claim to the denial of plaintiffs' rezoning request, did apply the first prong ripeness test to the substantive due process claim, holding that it had been satisfied. In dicta, the court stated that it is "not at all clear" that first prong ripeness should apply to a substantive due process claim premised upon arbitrary governmental action. In *Eide v. Sarasota County*, 895 F.2d 1326, 1329 n. 4, the court applied both ripeness prongs in denying plaintiff's due process and equal protection claims. See also, *Anthony v. Franklin County*, 799 F.2d 681, 686, reh'g denied, 804 F.2d 681 (11th Cir. 1986).

In *Executive 10, Inc. v. Martin County*, 922 F.2d 1536 (11th Cir. 1991), the court applied *Williamson County* ripeness prongs to dismiss plaintiffs' "due process takings claims" (at 1540), did not apply ripeness principles to "as applied equal protection claims" (at 1541), and did not apply ripeness principles to "as applied arbitrary and capricious due process claims" (at 1541).

B. There is Widespread Conflict between State Court Opinions about whether and how Ripeness Is Applied to the Resolution of Substantive and Procedural Due Process, Equal Protection and Temporary Takings Claims Under 42 U.S.C. Section 1983.

The Chief Justice observed in his opinion concurring in the judgment in *San Remo Hotel, supra,* slip opinion, p. 5 n. 2, that various state courts in takings cases apply second-prong ripeness creating the anomaly of preventing plaintiffs from asserting their federal takings claims even in state court, citing *Breneric Assoc. v. City of Del Mar*, 69 Cal.app.4th 166, 188-89, 81 Cal.Rptr.2d 324, 338-339 (1998); *Melillo v. City of New Haven*, 249 Conn. 138, 154 n. 28, 732 A.2d 133, 138

n. 28 (1999). Similar anomalies and more inconsistency have resulted from the application of *Williamson County* ripeness prongs to procedural and substantive due process and equal protection claims under Section 1983.

The California Supreme Court has applied substantive due process analysis in the context of rent control requiring writ review of a rent control board decision denying a rent adjustment, and if granted, requiring compensation when calculating future adjustments (called a "*Kavanau* adjustment"). *Kavanaugh v. Santa Monica Rent Control Board,* 16 Cal.4th 76, 941 P.2d 851 (Cal. 1997); *Galland v. City of Clovis,* 24 Cal.4th 1003, 16 P.3d 130 (Cal. 2001). These cases implicitly apply both prongs of *Williamson County* ripeness to substantive due process analysis. In *Long Beach Equities, Inc. v. County of Ventura,* 231 Cal.App.3d 1016, 1040-1941, the state appellate court applied *Williamson County* ripeness doctrines to reject plaintiff's procedural due process, substantive due process, equal protection and Section 1983 claims. In *San Mateo County Coastal Landowners' Assn. v. County of San Mateo,* 38 Cal.App.4th 523 (Cal.App. 1995), the court observed that both ripeness prongs applied to substantive due process and equal protection claims. Similar results were reached in *Smith v. City and County of San Francisco,* 225 Cal.App.3d 38 (Cal.App. 1990).

The Supreme Court of Hawaii has declined to apply ripeness principles to Section 1983 substantive due process claims in *Aged Hawaiians v. Hawaiian Homes Com'n,* 78 Hawaii 192, 891 P.2d 279, 290 (Haw. 1995).

In Illinois, the court in *Broughton Trucking & Material, Inc. v. County of Will,* 299 Ill.App.3d 576, 171 Ill.Dec. 299, 593 N.E.2d 1119, 1121 (Ill. 1992) applied ripeness principles

in a Section 1983 action involving an allegedly unfair property assessment.

The Supreme Court of Iowa has held that second prong ripeness is not required for Section 1983 substantive due process claims in *City of Iowa City v. Hagen Elecs., Inc.*, 545 N.W.2d 530, 535 (Iowa 1996). The court later held that both substantive due process and equal protection challenges are not subject to either ripeness prong in *Blumenthal Investment Trusts v. City of West Des Moines,* 636 N.W.2d 255, 263-64.

In *Maryland Reclamation Assocs. v. Harford County,* 342 Md. 476, 492-93, 398, 677 A.2d 567 (Md. 1986) the court applied first prong ripeness to due process claims. Similarly, the court applied first prong ripeness to deny plaintiff's due process claims in *Broadcast Equities, Inc. v. Montgomery County,* 123 Md.App. 363, 400, 718 A.2d 648 (Md.App. 1998).

In *Electro-Tech, Inc. v. H.F. Campbell Co.,* 433 Mich. 57, 445 N.W.2d 61, 63, 69-77 (Mich. 1989), the Supreme Court of Michigan applied both *Williamson County* ripeness prongs to reject not only takings, but also substantive due process claims. Justice Brinkley's spirited dissent highlights the conflict of authority in both federal and state courts over the application of ripeness principles to substantive due process claims. *Id. at* 77-95.

Many other cases throughout the nation have reached different results in applying ripeness doctrine to due process and equal protection claims. See further, *Mayhew v. Town of Sunnyvale,* 964 S.W.2d 922 (Tex. 1998); *Consolidated Waste Systems, LLC. V. Metro Government of Nashville,* No. 062705 TNCIV, M2002-0252-COA-R3-CV (Tenn. 2005);

Waters v. South Carolina Land Resources Conservation Com'n, 467 S.E.2d 913, 321 S.C. 219 (S.C. 1996); *L.A. Ray Realty v. Town Council of Town of Cumberland*, 698 A.2d 202 (R.I. 1997); *Merriam v. Philadelphia Hist. Com'n*, 777 A.2d 12121 (Pa.Comwlth 2001); *Texas keystone Inc v. Penn. Dept. of Conservation and Natural Resources*, No. 060704 PACCA, 702MD03 (2005); *Larson v. Munomah County*, 121 Or.App. 119, 854 P.2d 476 (Or.App. 1993); *Johnson v. Ferguson-Ramos*, No. 062805 OHCA10, 04AP-1180 (Ohio App. 2005); *Karches v. City of Cincinnati*, 38 Ohio St.3d 12, 526 N.E.2d 1350 (Ohio 1988); *Messer v. Town of Chapel Hill*, 125 N.C.app.57, 479 S.E.2d 221 (N.C.App. 1997); *Church of St. Paul and St. Andrew v. Barwick*, 67 N.Y.2d 10, 505 N.Y.S.2d 24 (N.Y. 1986); *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 643 N.Y.S.2d 21 (N.Y. 1996); *Manning v. Mining and Minerals Div. of Energy*, 90 P.3d 506 (N.M.App. 2004); *Rivkin v. Dover Tp. Rent leveling Bd.*, 143 N.J. 352, 671 a.2d 567 (N.J. 1996); *House of Fire Christian Church v. Zoning Board of Adjustment*, No. 082205 NJSUP,a019-03 (2005); *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (Neb 1994); *Hay v. City of Andover*, 436 N.W.2d 800 (Minn.App. 1989); *Daddario v. Cape Cod Comm'n*, 56 Mass.App.Ct. 764 (2002); Maryland *Reclamation Associates, Inc. v. Harford County*, 342 Md. 476, 677 A.2d 342 (Md. 1996); *Security Management Corp. v. Baltimore County, Md.* 104 Md.App. 234, 655 A.2d 1326 (Md.App. 1995); *Broadcast Equities, Inc. v. Montgomery County*, 123 Md.App. 363, 718 A.2d 648 (Md.App. 1998); *County Com'rs of Queen Anne's County v. Days Cover Reclamation Co.*, 122 md.App. 505, 713 A.2d 351; *Blumenthal Inv. Trusts v. City of West Des Moines*, 636 N.W.2d 255 (Iowa 2001); *Indiana Dept. of Environmental Management v. Chemical Waste Management, Inc.*, 643 N.E.2d 331 (Ind. 1994); *Droveres Bank of Chicago v. Village of Hinsdale*, 208 Ill.App.3d 147, 566 N.E.2d 899 (Ill.App. 2

Dist. 1991); *Greater Atlanta Homebuilders Ass'n v. DeKalb County*, 588 S.E.2d 694 (Ga. 2003); *Gardens Country Club, Inc. v. Palm Beach County*, 712 So.2d 398 (Fla.App.4 Dist. 1998); *Lost Tree Village Corp. v. City of Vero Beach*, 838 So.2d 561 (Fla App. 4 Dist. 2002); *Taylor v. Village of North Palm Beach*, 659 So.2d 1167 (Fla.App. 4 Dist. 1995); *City of Pompano Beach v. Yardarm Restaurant, Inc.* 641 So.2d 1377; *Jacksonville v. Wynn*, 650 So.2d 182 (Fla.App. 1 Dist. 1995); *Board of County Com'rs of Larimer County v. Conder*, 927 P.2d 1339 (Colo. 1996).

II. THE CALIFORNIA COURT OF APPEAL ERRED IN AFFIRMING JUDGEMENTS DENYING PETITIONER ANY ADEQUATE STATE LAW REMEDIES TO VINDICATE AND PROTECT HIS DUE PROCESS, EQUAL PROTECTION AND JUST COMPENSATION RIGHTS UNDER THE UNITED STATES CONSTITUTION AND 42 U.S.C. SECTION 1983.

In *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 l.Ed.2d 662 (1986), this Court, in holding that substantive due process clause was not implicated by a state's negligent deprivation of life, liberty, or property, pointed out that the guarantee of due process has historically been applied to deliberate decisions of government officials. Id. At 331, 106 S.Ct. at 665. This Court noted that the due process clause was "'intended to secure the individual from the arbitrary exercise of the powers of government,'" *id.* (quoting *Hurtado v. California*, 110 U.S. 516, 527, 4 s.Ct. 111, 116, 28 L.Ed. 232 (1884) (quoting *Bank of Columbia v. Okely*, 4 Wheat. (17 U.S.) 235, 244, 4 l.Ed. 559 (1819)); and distinguished the Daniels case from cases involving an abuse of power. This Court's recent decision in *Lingle v. Chevron USA, supra,* realigning the elements of regulatory takings,

shifts a portion of that analysis to the sphere of substantive due process where the governmental action advances no legitimate public purpose. In this case, the governmental entities are unable to cogently state what legitimate public purpose was served by conditioning the holding of a public hearing upon the execution of an onerous exaction agreement.

In *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986), this Court held that mere negligence of the part of a state does not amount to an abuse of state power such that constitutional due process is implicated. Justice Blackmun, dissenting, noted that he agreed with the majority's conclusion that a "deprivation must contain some element of abuse of governmental power, for the 'touchstone of due process is protection of the individual against arbitrary action of the government.'" *Id.* At 353, 106 S.Ct. at 673 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974)). See also, *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 263, 97 S.Ct. 555, 562, 50 L.Ed.2d 450 (1977) (constitutional right to be free of arbitrary or irrational zoning action); *Pace Resources, Inc. v. Shrewsbury Twp.*, 808 F.2d 1023, 1034-35 (3d Cir.), cert. denied, 107 S.Ct. 2482, 96 L.Ed.2d 375 (1987). In *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983), the court held that improper intervention in the issuance of a building permit by town council members motivated by a lack of impartiality stated a claim for violation of substantive due process. These cases teach that deliberate and arbitrary abuse of government power violates an individual's right to substantive due process.

Many courts have held that land use decisions of governmental agencies are subject to substantive due process scrutiny and that such decisions must not be arbitrary and capricious so as to amount to an abuse of governmental

power. See *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926); *Spence v. Zimmerman*, 873 F.2d 256, 258-62 (11th Cir. 1989); *Bello v. Walker*, 840 F.2d 1124, 1128-30 (3d Cir. 1988) (applying substantive due process to non-legislative, administrative action); *South Gwinnett Venture v. Pruitt*, 491 F.2d 5, 7 (5th Cir.) (en banc), cert. denied, 419 U.S. 837, 95 S.Ct. 66, 42 L.Ed.2d 64 (1974). When a federally protected property interest is deprived, the courts have held that a deprivation of a property interest is of constitutional stature if it is undertaken "'for an improper motive and by means that were pretextual, arbitrary and capricious, and ... without any rational basis.'" *Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989) (quoting *Hearn v. City of Gainseville*, 688 F.2d 1328, 1332 (11th Cir., 1982); *Anthony v. Franklin County*, 799 F.2d 681, 684 (11th Cir. 1986).

Many courts have also held that procedural due process requires that a state provide "'reasonable remedies to rectify a legal error by a local administrative body.'" *Cohen v. City of Philadelphia*, 736 F.2d 81, 86 (3d Cir.), cert denied, 469 U.S. 1019, 105 S.Ct. 434, 83 l.Ed.2d 360 9984) (quoting *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 832 n. 9 (lst Cir.), cert. denied, 459 U.S. 989, 103 S.Ct. 345, 74 L.Ed.2d 385 (1982). Neither the city nor the state provided any such remedies to Petitioner, and the city in fact simply ignored Petitioner's appeal of delaying and conditioning the hearing upon negotiation and execution of the written exaction requirements of the city and state.

Consistent with this Court's recent opinion in *San Remo Hotel, Llp. v. City and County of San Francisco,* Petitioner joined in his state court proceedings both his state and federal constitutional claims. Consistent with this Court's recent opinion in *Lingle v. Chevron U.S.A.*, 545 U.S. ___,

Petitioner plead federal substantive due process claims. As discussed *supra*, the state trial and appellate courts denied all of these claims based upon the implicit or express application of the first and second prong *Williamson County* ripeness requirements to summarily dispose of these claims. Petitioner sought mandate, state inverse condemnation damages, and declaratory relief remedies under state law, which were rebuffed by the trial court due to a lack of standing because, in Petitioner's view, the damaging actions of the government entities intentionally directed at him consumed all of his option rights.

Neither the state trial nor appellate courts denied that California law clearly recognizes that option rights are protected property rights. *County of San Diego v. Miller* (1975) 13 Cal.App.3d 684, 119 Cal.Rptr. 491; *Toso v. City of Santa Barbara,* 101 Cal.App.3d 934, 162 Cal.Rptr 210 (unreasonable activity constitutes a *de facto* takings during the option period); *Mola Devel. Corp. v. City of Seal Beach,* 57 Cal.App.4th 405 (owner of expired option has standing to pursue claims against local government).

Neither the state trial nor appellate courts denied that the right to damages has been consistently found to survive the loss of property interests because that damage has already occurred in a concrete, definite sense. *County of Los Angeles v. Berk,* 26 Cal.3d 201, 232 n. 3 (foreclosed owner retains interest in obtaining monetary redress against government entity); *Klopping v. City of Whittier,* 8 Cal.3d 39, 58 (foreclosed owner retained inverse condemnation claims).

Neither the state trial nor appellate courts denied that the reasonable expectation of property owners under California statutes and administrative regulations requiring the environmental impact reports be certified within one year of

the date that the application on a private development project is deemed complete. (Cal. Pub.Resources Code Section 21100.2; Cal.Code Admin. Regs, Title 14, Section 15108). Neither the state trial nor appellate courts could deny that these expectations of timely hearings are so fundamental that other state courts have held that their breach subjects a governmental agency for a cause of action under Section 1983 for a violation procedural due process. *Sunset Drive Corp. v. City of Redlands,* 73 Cal.App.4th 215; *Vedanta Society of Southern California v. California Quartet, Ltd,* 84 Cal.App.4th 517, 535.

Neither the state trial nor appellate courts denied that due process violations did not occur, or found that the delays and exaction requirements constituted "normal processing delays" exempt from Fifth and Fourteenth Amendment and Section 1983 compensation for a temporary takings under *First English Evan. Lutheran Church v. Los Angeles County,* 482 U.S. 304, 107 S.Ct. 2378 (1987).

Neither the state trial nor appellate courts found that the course of conduct of the governmental agencies against Petitioner were reasonable, necessary, served a legitimate public purpose, or were otherwise constitutional. The agencies themselves have never been able to justify the failure to timely act upon Petitioner's applications, or why they used the unconscionable leverage of delay to exact written agreements for the acquisition of other private property, and maintenance endowments. Instead of requiring the physical dedication of the regulated property as present in *Nollan v. California Coastal Commission,* 483 U.S. 815, 107 S.Ct. 3141, 97 l.Ed.2d 677, and *Dolan v. Tigard,* 512 U.S. 374, 1145 S.Ct. 2309, 129 L.Ed.2d 304 (1994), the government agencies passed-on their desire to own three times as much other property as a condition to a public hearing. They

sought to transform the Petitioner into a private condemnor of other private property without his even having the power of condemnation.

The California court of appeal in this case would require a two-writ, second prong ripeness standard going well beyond *Williamson County*: one writ to enforce procedural and substantive due process rights to hold a hearing and a second writ after the decision is made to challenge the city and state decisions which offend the takings, equal protection, and due process clauses. Nowhere in that process is there compensation for an injury which has already been made concrete and definite. Nor is there any guarantee that writ remedies alone will deter arbitrary and capricious patterns of conduct engaged in by government entities. This flies in the face of this Court's teaching that "[a] property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain" a final decision from the government agencies. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 n. 7, 106 S.Ct. 2561, 2567 n. 7, 91 L.Ed.2d 285 (1986) (citing *Williamson, supra*, 473 U.S. at 205-06, 105 S.Ct. at 3126-27 (Stevens, J. concurring)).

The state court of appeal in this case erred in imposing unreasonable procedural impediments to Petitioners Section 1983 claims in violation of long established precedents of this Court. *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 502-507, 102 S.Ct. at 2560-63 (1982); *Felder v. Casey*, 487 U.S. 131, 147-48, 108 S.Ct. 2302, 2311-12 (1988); *Zinnermon v. Burch*, 494 U.S. 113, 124-25, 110 S.Ct. 975, 982-83, 108 L.Ed.2d 123 (1990).

Moreover, the state court's preclusion of Section 1983 remedies because Petitioner did not bring the correct type of

state court writ or was denied standing to pursue other writ and equitable remedies should remind this Court of the observations in Justice Brennan's dissent in *San Diego Gas & Electric Company*, 451 U.S. 621, 655-657, that invalidation "unaccompanied by payment of damages would hardly compensate the landowner for any economic loss suffered during the time his property was taken." More importantly, Justice Brennan in footnote 22 reminds us that a writ remedy "hardly prevents enactment of subsequent unconstitutional regulations by the government entity." *Id.* Justice Brennan cited the strategy often employed by government attorneys in jurisdictions with limited availability of Section 1983 claims: "IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN. ... See how easy it is to be a City Attorney." (Quoting Longtin, AVOIDING AND DEFENDING CONSTITUTIONAL ATTACKS ON LAND USE REGULATIONS, 38B NIMLO Municipal Law Review 192-193 (1975). Once a due process or equal protection violation has occurred, a concrete constitutional injury deserving a damages remedy; a state writ procedure can only terminate on-going conduct (perhaps), but it does not redress the violation of privileges and immunities guaranteed by the Constitution and laws of the United States.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WILLIAM S. WALTER
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SEPTEMBER 6, 2005

APPENDIX A

SUPREME COURT OF CALIFORNIA
En Banc

S133539

[Filed June 8, 2005]

JACK MUNARI, Plaintiff and Appellant,	)
v.	)
CITY OF EL PASO DE ROBLES et al., Defendants and Respondents.	)

On Appeal From
Second Appellate District, Division Six
No. B167996

OPINION

Petition for review DENIED.

APPENDIX B

COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

Civil No. B167996

[Filed April 18, 2005]

JACK MUNARI, Plaintiff and Appellant,	)
v.	)
CITY OF EL PASO ROBLES et al., Defendants and Respondents.	)

On Appeal From
San Luis Obispo County Super. Ct.
No. CV 010860

ORDER MODIFYING OPINION
AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]

It is ordered that the opinion filed herein on March 23, 2005, be modified as follows:

1. On page 6, the third full paragraph, beginning "In any event" is deleted in its entirety.

2. On page 12, after the first full paragraph, add the following paragraph:

> Munari also claims he was denied equal protection when he was required to execute the kit fox mitigation agreement. Other developers were not required to execute such an agreement. But the agreement was dependent on the City's approval of his master plan application. Whatever merit the argument may have had, it became moot when the City denied his application.

3. On page 12, section VII, third full paragraph, after the third sentence starting with the words "His brief" and ending with the word "compelling," add the following sentences:

> Contrary to Munari's contention in his petition for rehearing we do not assert that he failed to offer an explanation for not completing discovery. The trial court simply did not credit his explanation.

There is no change in the judgment.

Appellant's petition for rehearing is denied.

APPENDIX C

COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

B167996

[Filed March 23, 2005]

JACK MUNARI,	)
Plaintiff and Appellant,	)
	)
v.	)
	)
CITY OF EL PASO ROBLES et al.,	)
Defendants and Respondents.	)
	)

On Appeal From
Superior Court County of San Luis Obispo
No. CV 010860
Douglas Hilton, Judge. Roger T. Picquet, Judge.

JUDGES: GILBERT, P. J.; COFFEE, J., PERREN, J.

OPINION

Jack Munari filed a complaint alleging the City of El Paso de Robles (city) and the California Department of Fish and Game (DFG) took his property and violated his constitutional rights. He claims the defendants unreasonably delayed an

environmental impact report (EIR) certification hearing, and that the city arbitrarily imposed a specific plan requirement. The defendants successfully demurred to some causes of action and obtained summary adjudication on the remaining causes of action. We affirm the judgment.

FACTS

Jack Munari had an option to purchase the Chandler Ranch, consisting of 673 acres in the City of El Paso Robles. His master plan for development of the ranch called for 521 apartment units, 438 senior mobile home units, and 286 single family residences, as well as manufacturing and commercial uses. The existing zoning would allow for only 250 dwelling units.

Munari's master plan required, among other actions, a general plan amendment and zoning changes. On May 24, 1999, the city began the environmental review process for the project, serving as the lead agency. The DFG responded to the city's notice of preparation of the draft environmental impact report (DEIR). The DFG reported that the San Joaquin kit fox, a species protected by state and federal law, has recently been seen on the property. It recommended a detailed analysis of the issue in the DEIR and offered guidance on how the impacts on the kit fox should be analyzed.

On June 30, 2000, the city issued the DEIR for the project. The public comment period ended on August 14, 2000. During the public comment period, the DFG stated that the analysis of the impacts on the kit fox was inadequate. The results of further study convinced the DFG that Munari's project would impact the kit fox and that mitigation measures would be required.

On September 22, 2000, Munari's attorney wrote to the city requesting that the certification for the final EIR be placed on calendar on October 3, 2000. The letter pointed out that Pubic Resources Code section 2110.2 and the California Code of Regulations, Title 14, section 15108, require certification of the EIR within one year of acceptance of the completed application. Munari claimed he completed the application on May 24, 1999. The letter threatened a petition for a writ of mandate to require the city to act on the EIR.

The city's attorney replied that the application was not complete until mid-January of 2000, and that the city was in the process of responding to comments received in response to the DEIR.

On October 23, 2000, the DFG recommended mitigation measures to protect the kit fox. Initially, it recommended that Munari set aside five acres of habitat for every acre impacted by the project. Later, the DFG lowered the ratio to three to one. Munari proposed a one-to-one ratio. The DFG and Munari continued to negotiate the terms of the mitigation.

On January 22, 2001, the DFG recommended that the city not certify the EIR until Munari signed a formal mitigation agreement. The city adopted the DFG's recommendation and refused to calendar the certification until Munari signed the agreement. On January 30, 2001, Munari wrote to the city protesting its decision. He stated he knew of no authority that allowed the city to require a mitigation agreement before certification.

Munari's attorney submitted the first draft of the mitigation agreement on February 21, 2001. On March 22, 2001, having submitted further drafts, Munari appealed to the city counsel the planning director's decision not to calendar

the certification hearing until the mitigation agreement is final.

The mitigation agreement was executed on June 11, 2001. It required a mitigation ratio of three to one. The city held a hearing on June 19, 2001, at which it certified the EIR but denied Munari's development plan.

The EIR analyzed the impacts of Munari's proposal and, as alternatives, analyzed the impact of development under existing regulations and no project. The EIR concluded that existing zoning and density levels were environmentally preferred over alternatives.

Shortly after the denial of his master plan project, Munari submitted an application for a tract map to subdivide one of the existing parcels within the ranch. He claims the proposal was in conformance with the existing land use regulations and "substantially identical" to one of the approved phases considered as an alternative in the certified EIR. On September 6, 2001, however, the city amended its general plan to require a specific plan for Chandler Ranch prior to processing any entitlements to use the ranch. In 1998, the city had deleted a specific plan requirement for the Chandler Ranch. In deleting the requirement, the city found it would have no adverse environmental impacts.

Munari's option to purchase the ranch expired on September 11, 2001.

In October of 2001, Munari filed a complaint alleging that the actions of the city and the DFG in delaying certification of the EIR and imposing the requirement of the specific plan took his property and violated his constitutional rights. Munari sought damages, declaratory relief and mandate. The

city and DFG successfully demurred to some causes of action and obtained summary adjudication as to the remaining causes of action.

DISCUSSION

I

Munari contends the trial court erred in sustaining demurrers to the causes of action alleging a taking of his property.

The function of a demurrer is to test the sufficiency of a pleading by raising questions of law. (*Postley v. Harvey* (1984) 153 Cal. App. 3d 280, 286, 200 Cal. Rptr. 354.) In assessing the sufficiency of a demurer, all facts pleaded in the complaint must be deemed true. (*Hoiland v. Thacher* (1988) 199 Cal. App. 3d 924, 928, 245 Cal. Rptr. 247.) But we do not assume the truth of contentions, deductions, or conclusions of fact or law. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125, 271 Cal. Rptr. 146.) If upon consideration of all the facts stated it appears that the plaintiff is entitled to any relief, the complaint will stand. (*Chase Chemical Co. v. Hartford Accident & Indemnity Co.* (1984) 159 Cal. App. 3d 229, 242, 205 Cal. Rptr. 469.)

Munari's complaint alleges that the city unreasonably delayed in certifying the EIR; the city and state imposed an arbitrary and unreasonable requirement that he execute a kit fox mitigation agreement; and the city denied him any beneficial use of his option by imposing a specific plan requirement.

Munari's argument that he has alleged sufficient facts to state a cause of action for an unconstitutional taking is based

on the theory that the city and state denied him all beneficial use of his option rights.

A categorical taking occurs when an owner is required to sacrifice all economically beneficial use of his property. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1019, 120 L. Ed. 2d 798.) But it is impossible to determine whether a regulation has deprived a landowner of all economically beneficial use until the responsible state agency makes a final determination of the extent of permitted development. (*Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 618, 150 L. Ed. 2d 592.) Until such time, a taking claim is not ripe for adjudication. (*Ibid.*) The ripeness requirement applies to both state and federal inverse condemnation actions. (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 12.)

Here under the facts pleaded by Munari, the only development plan the city rejected was Munari's master plan. That plan required changes in the general plan and zoning. Munari submitted another plan to develop part of the ranch, but the complaint does not allege that the city rejected that plan. Instead, the city amended its general plan to require a specific plan before any development approval. Munari let his option expire without submitting a specific plan. The city has never made a final determination of the extent of permitted development. Munari's taking claim is not ripe for adjudication.

Munari argues that the alleged unreasonable delay in calendaring a hearing on the EIR constitutes a taking. He relies on *First English Evangelical Lutheran Church of Glendale v. Los Angeles County* (1987) 482 U.S. 304, 96 L. Ed. 2d 250. There plaintiff alleged an interim county ordinance prohibiting any structure on plaintiff's land constituted a taking in that it denied plaintiff all use of his

property. The trial court struck the allegation on the ground that even if the allegation is true, plaintiff's remedy is limited to having the ordinance declared void by way of writ of mandate. In concluding that such an ordinance can constitute a compensable temporary taking, even if the ordinance were repealed, the court stated: "We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." (*Id.* at p. 321.)

Here, like *First English Evangelical Lutheran Church of Glendale*, Munari claims he was deprived of all economically beneficial use. But that case is readily distinguishable. There plaintiff alleged the county's ordinance prohibited any structure on the land. Here the city's delay in certifying the EIR simply delayed consideration of one proposed economically beneficial use. It cannot be said the city's delay deprived him of all economically beneficial use.

Moreover, if the city's delay in considering certification of the EIR was unreasonable, Munari had a remedy in mandate. (See *Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 222.) Although mandate could not compel the city to certify the EIR, it could compel the city to decide the matter. (*Ibid.*)

Munari's failure to seek mandate is fatal to his claim for damages resulting from any delay in certifying the EIR. Munari must exhaust state administrative and judicial remedies prior to seeking damages for inverse condemnation. (*Williamson County Regional Planning Comm'n. v. Hamilton Bank of Johnson City* (1985) 473 U.S. 172, 194-195, 87 L. Ed. 2d 126.) In California those remedies include mandate.

(See *Hensler v. City of Glendale*, *supra*, 8 Cal.4th at pp. 13-14.) The purpose of the mandate requirement is to allow the public agency the opportunity to mitigate damages should its actions be construed as a taking. (See *County of San Luis Obispo v. Superior Court* (*Munari*) (2001) 90 Cal.App.4th 288, 292; *Patrick Media Group, Inc. v. California Coastal Com.* (1994) 9 Cal.App.4th 592, 612.) As we warned in *County of San Luis Obispo v. Superior Court* (*Munari*), Munari cannot wait to seek such damages until the question of relief by mandate becomes moot. Here relief by mandate became moot when the city held the hearing at which the EIR was certified. It is too late now to seek damages for the delay.

Munari argues that the city's requirement for the submission of a specific plan constitutes a moratorium that deprived him of all beneficial use of his land. But the requirement of a specific plan does not prohibit all beneficial use of the land. It simply delays beneficial use until the plan is approved. It constitutes one of the ordinary delays that *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, *supra*, exempted from its holding.

In any event, Munari's option expired a few days after the city imposed the specific plan requirement. He made no attempt to exhaust the judicial remedies available to him to challenge the requirement. As we explained, that is fatal to his claim for damages. (See *Mola Development Corp. v. City of Seal Beach* (1997) 57 Cal.App.4th 405 [developer's dismissal of pending mandamus action because option expired precluded damages in inverse condemnation].)

Munari claims that his property was taken because the city's actions failed to substantially advance a legitimate government interest. (Citing *City of Monterey v. Del Monte Dunes* (1999) 526 U.S. 687, 143 L. Ed. 2d 882.) He argues

there is no rational nexus between the requirement that he sign the mitigation agreement and scheduling a public hearing on the certification of the EIR. Assuming that to be true, he had a remedy in mandate to compel the city to hold a hearing. His failure to exhaust his remedies precludes compensation for a taking. (See *Hensler v. City of Glendale*, *supra*, 8 Cal.4th at p. 13.)

Munari contends the court erred in sustaining demurrers to his substantive and procedural due process claims. He argues that a violation of due process subjects the city and the state to an action for damages under 42 United States Code section 1983.

The Fourteenth Amendment of the United States Constitution prohibits the state from depriving any person of life, liberty or property without due process of law. The due process clause of the California Constitution (art. 1, § 13) is identical in scope and purpose to the federal clause. (*Gray v. Whitmore* (1971) 17 Cal. App. 3d 1, 20, 94 Cal. Rptr. 904.)

Here Munari's claim that the property interest in his option was taken without due process is nothing more than a reiteration of his taking claim. He cannot avoid the ripeness requirements of a taking claim simply by recasting the claim as a violation of due process. Thus in *Armendariz v. Penman* (9th Cir. 1996) 75 F.3d 1311, 1324-1326, the court held a property owner cannot present what is essentially a taking claim as a substantive due process claim. The court pointed to the requirement for exhausting state remedies prior to seeking compensation for a taking as a sound reason for this rule. (*Id.* at p. 1325; accord *Ventura County Flood Control Dist. v. Campbell* (1999) 71 Cal.App.4th 211, 223.) The same reasoning applies to a claim of procedural due process.

The cases on which Munari relies are easily distinguishable. *Sunset Drive Corp. v. City of Redlands*, *supra*, 73 Cal.App.4th at p. 225, and *Vedanta Society of Southern California v. California Quartet Ltd.* (2000) 84 Cal.App.4th 517, 535, held allegations that a city failed to act on the certification of an EIR in a timely manner states a cause of action for violation of due process. But in each case the property owner exhausted legal remedies by petitioning for mandate to compel the city to act. Here Munari failed to exhaust his remedies by petitioning for a writ of mandate.

III

Munari contends the trial court erred in holding he has no standing to pursue mandamus.

As we have explained, Munari's claim for damages is barred under the ripeness doctrine. But Munari has also included a petition for writ of mandate in his complaint.

Any action for mandate or declaratory relief alleging unreasonable delay in setting the EIR certification hearing became moot once the city set the matter for a hearing. That leaves the question of the city's imposition of the specific plan requirement.

The city argues that Munari has no standing to challenge the specific plan requirement because his option expired and he no longer has an interest in the property. The city points out that in order to seek a writ of mandate, the petitioner must show that he is "beneficially interested" in the litigation. (Code Civ. Proc., § 1086.) Beneficially interested means that the petitioner has some special interest to be served or some particular right to be preserved over and above the interest held in common with the public at large. (*Embarcadero*

Municipal Improvement Dist. v. County of Santa Barbara (2001) 88 Cal.App.4th 781, 786-787.)

Munari claims he has standing based on his continuing efforts to reestablish option rights to the property, his extensive efforts in the regulatory process, being a resident of the city and being a developer affected by the policies and practices of the state.

We need not decide whether Munari has standing to challenge the imposition of the specific plan requirement. Even assuming he has standing, as we explain in the following portions of the opinion, his claims lack merit.

IV

Munari contends the trial court erred in granting summary adjudication on his cause of action based on the California Environmental Quality Act (CEQA). (Pub. Resources Code, § 21000 et seq.)

A defendant who contends a cause of action has no merit may move for summary adjudication as to that cause of action. (Code Civ. Proc., § 437c, subd (f)(1)) A motion for summary adjudication proceeds in the same manner as a motion for summary judgment. (*Id.* at subd. (f)(2).) Summary adjudication is properly granted only if all papers submitted show there is no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law. (*Id.* at subd. (c).) The court must draw all reasonable inferences from the evidence set forth in the papers except where such references are contradicted by other inferences or evidence which raise a triable issue of fact. (*Ibid.*) In examining the supporting and opposing papers, the moving party's affidavits or declarations are strictly construed and those of his

opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19.) Once a defendant shows that a cause of action has no merit, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exist. (Code Civ. Proc., § 437c, subd. (p)(2).)

Munari claims the city violated CEQA when it amended the general plan to require a specific plan for the ranch. He argues the city failed to notify the DFG prior to issuing a negative declaration.

During the initial study to determine whether a negative declaration or EIR is required, the lead agency must consult with all responsible agencies and with any other public agency which has jurisdiction by law over natural resources affected by the project. (Pub. Resources Code, § 21080, subd. (a).) The CEQA Guidelines (Cal. Code Regs., tit. 14, § 15000 et seq.; hereafter Guidelines) require the lead agency to send notice of an intent to adopt a negative declaration to every responsible agency and trustee agency concerned with the project, as well as every other pubic agency with jurisdiction by law over resources affected by the project. (Guidelines, § 15073, subd. (c).)

A responsible agency is a public agency that proposes to carry out or approve a project for which a lead agency is preparing an EIR or negative declaration. (Guidelines, § 15381.) It includes all public agencies other than a lead agency which have discretionary approval power over a project. (*Ibid.*)

The DFG is clearly not a responsible agency. It did not propose to approve or carry out an amendment of the general plan to require a specific plan. Nor does it have any discretion to approve such a project.

A trustee agency is a state agency having jurisdiction by law over natural resources affected by a project, which resources are held in trust for the people of the state. (Guidelines, § 15386.) The DFG is such an agency. (*Ibid.*)

Even though the DFG is a trustee agency, the lead agency is not required to send notice to every trustee agency. The CEQA Guidelines require notice only to those responsible and trustee agencies that are "concerned with the project and every other public agency with jurisdiction by law over resources affected by the project." (Guidelines, § 15073, subd. (c).) A trustee agency cannot be said to be concerned with a project unless it has jurisdiction over or some interest in the public resources affected by the project.

It is easy to see how a particular specific plan that proposes actual development may affect public resources. But here the city did not consider any particular specific plan or other development proposal. It simply adopted a general requirement for an approved specific plan prior to development. Such a general requirement is too abstract to affect public resources. It is not possible to determine how a specific plan may affect public resources until one is actually proposed. The city did not violate CEQA by failing to give the DFG notice of its intent to adopt a negative declaration.

Munari's reliance on *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1386-1389, is misplaced. There a city failed to give notice to the DFG of its intent to adopt a negative declaration for the approval of a vesting tentative

subdivision map. Unlike the general plan amendment in this case, the project in *Gentry* involved an actual development proposal.

V

Munari contends the general plan amendment requiring a specific plan violates substantive due process in that it is not reasonably related to a legitimate public interest.

The undisputed facts are that the property subject to the specific plan is 673 acres and contains 8 parcels; it includes the most extensive oak woodland in the city; and it is surrounded by steep hillsides that present a significant challenge to vehicular access and development.

On its face, this is the type of parcel for which a specific plan can be beneficial. The city has a legitimate public interest in requiring a specific plan to preserve the parcel's natural resources and prevent piecemeal development. (See *Kawaoka v. City of Arroyo Grande* (9th Cir. 1994) 17 F.3d 1227, 1234 [reasonable for city to impose specific plan requirement on 55 acres of agricultural land].) It is true the city had previously abandoned the requirement of a specific plan for the parcel. But nothing prevents the city from reconsidering and reimposing the specific plan requirement.

VI

Munari contends the trial court erred in granting summary adjudication on his equal protection claims.

Munari cites *Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564, 145 L. Ed. 2d 1060, for the proposition that equal protection gives rise to a cause of action on behalf of a

"'class of one.'" He claims no other property has been similarly treated by the city.

But Munari misreads *Village of Willowbrook*. That case does not prohibit the creation of a class of one. It simply holds that a plaintiff can state an equal protection claim on behalf of a class of one, and need not allege membership in a class or group. A complaint alleges facts sufficient to state a cause of action for violation of equal protection where it alleges plaintiff has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. (*Village of Willowbrook v. Olech*, *supra*, 528 U.S. at p. 564.)

The undisputed facts show there are two properties within the city other than the Chandler Ranch that are subject to a specific plan requirement. All the other properties within the city that Munari claims are similar to the Chandler Ranch are significantly smaller. Two of the properties that Munari claims are similar are a 400-acre golf course and a 40-acre park. A golf course and a park are substantially different than Munari's proposed residential subdivision. The undisputed facts show that any difference in treatment between the Chandler Ranch and other parcels within the city has a rational basis. The trial court did not err in granting summary adjudication on Munari's equal protection causes of action.

VII

Munari contends the trial court erred in denying him a continuance pursuant to Code of Civil Procedure section 437c, subdivision (h).

Code of Civil Procedure section 437c, subdivision (h), requires the trial court to grant a continuance in a motion for

summary judgment or adjudication where it appears from affidavits opposing the motion "that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented . . . ." To obtain a continuance, the affidavit must show there is reason to believe facts essential to opposing the motion may exist and the reason why additional time is needed to obtain the facts. (*Frazee v. Seely* (2002) 95 Cal.App.4th 627, 633.)

Munari's opening brief simply states that counsel's declarations were sufficient to meet the requirements of the statute and that the state's discovery response was evasive and incomplete. Munari follows his statement with numerous citations to the record, but his brief contains no specification of facts or legal argument. His brief fails to state why the trial court was required to find his assertions of fact credible or his excuse for not completing discovery compelling. He filed the original complaint on October 4, 2001, the city did not file its motion for summary adjudication until October 11, 2002. Munari has failed to carry his burden of showing the trial court erred. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, pp. 627-628.)

The judgment is affirmed. Costs are awarded to respondent.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

COFFEE, J.
PERREN, J.

APPENDIX D

IN THE SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN LUIS OBISPO

Case No. CV 010860

[Filed October 6, 2003]

JACK MUNARI, Plaintiff,	)
v.	)
CITY OF EL PASO DE ROBLES, a municipal corporation, CITY COUNCIL OF THE CITY OF EL PASO DE ROBLES PLANNING COMMISSION OF THE CITY OF EL PASO DE KOBLES, ROBERT LATA, in his official capacity as Community Development Director of PLANNING DEPARTMENT OF THE CITY OF EL PASO DE ROBLES, CALIFORNIA DEPARTMENT OF FISH AND GAME, and Does 1 through 100, inclusive, Defendants.	)

CONSOLIDATED JUDGMENT AFTER SUSTAINING DEMURRERS WITHOUT LEAVE TO AMEND AND GRANTING MOTIONS FOR SUMMARY ADJUDICATION

Honorable Douglas Hilton.

The demurrer of the City of El Paso de Robles and the State of California on the Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, and Thirteenth causes of action in Petitioner and Plaintiffs First Amended Petition/Complaint came on regularly for hearing before the above captioned court on April 11, 2002 before the Honorable Roger T. Picquet. William S, Walter, Esq., appeared on behalf of Plaintiff, Iris P. Yang, Esq. of McDonough Holland & Allen, appeared on behalf of Defendants City of El Paso de Robles, and Paul C. Epstein of the California State Attorney General's office appeared on behalf of Defendant State of California. The Court, having considered the moving opposing papers, including all evidence in support thereof and objections made thereto and oral argument and the matter having been submitted, issued its order sustaining without leave to amend the demurrer to the Fifth Cause of Action [Procedural Due Process under the California Constitution] and Sixth Cause of Action [Procedural Due Process under the United States Constitution], the Seventh Cause of Action [Substantive Due Process under the California Constitution] and the Eighth Cause of Action [Substantive Due Process under the United States Constitution], the Eleventh Cause of Action [Inverse Condemnation under the California Constitution] and Twelfth Cause of Action [Just Compensation under the United States Constitution]. Petitioner and Plaintiff was granted leave to file

a Second Amended Petition and Complaint with regard to the remaining causes of action.

The remaining causes of action came on regularly for hearing on the Motion for Summary Adjudication by the City of El Paso de Robles as to the First, Second, Third, Fifth, Sixth and Seventh Causes of Action of Petitioner Jack Munari's Second Amended Petition and Complaint on December 12, 2002, and on the Motion for Summary Adjudication by the State of California (Department of Fish and Game) as to the Third, Fourth, Fifth and Sixth Causes of Action of Petitioner's Second Amended Petition and Complaint on March 5, 2003. Iris P. Yang appeared for the City of El Paso de Robles at the heating on December 12, 2002. Gregory Newmark and Paul C. Epstein appeared for California Department of Fish and Game at the hearing on March 5, 2003. William Walter appeared for Petitioner and Plaintiff, Jack Munari at both hearings.

The Court having heard and considered the arguments of counsel and the evidence, authorities and briefing submitted in this matter, the matters having been submitted for decision, and the Court having issued its Order on Motion for Summary Adjudication of the First, Second, Third, Fifth, Sixth and Seventh Causes of Action in Petitioners and Plaintiffs Second Amended Complaint for Writ of Mandamus; Complaint for Declaratory and Injunctive Relief and Damages for Violation of Civil Rights on April 17, 2003, and the Court having issued its Order Granting Summary Adjudication on Motion by Defendant California Department of Fish and Game as to Third, Fourth, Fifth, and Sixth Causes of Action in Second Amended Petition and Complaint on July 23, 2003, and the Court having issued an order that a consolidated judgment on the two orders be prepared, and good cause appearing;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that

1. Petitioner and Plaintiff, Jack Munari, takes nothing by way of his Fifth, Sixth, Seventh, Eighth, Eleventh and Twelfth causes of action in his First Amended Petition/Complaint in accordance with the order sustaining demurrers entered by the Court on June 9, 2002, attached hereto incorporated herein as Exhibit "A".

2. Petitioner and Plaintiff, Jack Munari, takes nothing by way of his petition for writ of mandamus and complaint for declaratory and injunctive relief and damages for violation of civil rights in accordance with the order entered by the Court on April 17, 2003, attached hereto and incorporated herein as Exhibit "B," the order entered by the Court on July 23, 2003, attached hereto and incorporated herein as Exhibit "C," which determined that Petitioner and Plaintiff failed to state facts sufficient to constitute causes of action challenging City of El Paso de Robles' actions under the California Environmental Quality Act, challenging the City's adoption of its General Plan Amendment, for declaratory relief for violation of Petitioner and Plaintiff's right to equal protection Under the state and federal constitutions and for violation of 42 U.S.C. section 1983, and the ruling entered by the Court on July 10, 2003, attached hereto and incorporated herein as Exhibit "D," which granted Plaintiffs objection of hearsay as to Paragraph 6, page 3, lines 9-12 in the Decimation of Bob Lata, and overruled all other evidentiary objections made by Plaintiff in connection with Defendant City of El Paso de Robles' Motion for Summary Adjudication heard on December 12, 2002.

3. The second amended petition for writ of mandamus; complaint for declaratory and injunctive relief and damages for violation of civil rights is dismissed and judgment is hereby entered for Respondents and Defendants City of El Paso de Robles and California Department of Fish and Game.

4. Respondents and Defendants City of El Paso de Robles and California Department of Fish and Game shall recover their costs of suit.

DATED: OCT 6, 2003

/S/ DOUGLAS HILTON
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

Case No. CV 010860

[Filed June 9, 2002]

JACK MUNARI, Plaintiff,	)
v.	)
CITY OF EL PASO DE ROBLES, a municipal corporation, CITY COUNCIL OF THE CITY OF EL PASO DE ROBLES PLANNING COMMISSION OF THE CITY OF EL PASO DE KOBLES, ROBERT LATA, in his official capacity as Community Development Director of PLANNING DEPARTMENT OF THE CITY OF EL PASO DE ROBLES, CALIFORNIA DEPARTMENT OF FISH AND GAME, and Does 1 through 100, inclusive, Defendants.	)

ORDER ON DEMURRER TO THE FIFTH, SIXTH, SEVENTH, EIGHT, NINTH, TENTH, ELEVENTH, TWELFTH, AND THIRTEENTH CAUSES OF ACTION IN PETITIONER/ PLAINTIFF'S FIRST AMENDED COMPLAINT FOR WRIT OF MANDAMUS; COMPLAINT OF R DECLARATORY RELIEF AND DAMAGES FOR VIOLATION OF CIVIL RIGHTS; INVERSE CONDEMNATION; TAKINGS

The demurrer of the City of de Robles and the State of California on the fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth causes, of action came on regularly for hearing before this Court on April 11, 2002, before the Honorable Roger T. Picquet. William S. Walter, Esq. appeared on behalf of the Plaintiff, Iris P. Yang, Esq. of McDonough, Holland & Allen appeared on behalf of Defendant City of El Paso de Robles, and Paul C. Epstein of the California State Attorney General's office appeared on behalf of Defendant State of California.

The Court, having considered the moving and opposing papers, including all evidence in support thereof and objections made thereto and oral argument and the matter having been submitted, issued and filed its Ruling on Demurrer on May 6, 2002, a copy of which is on file in this matter.

IT IS HEREBY ORDERED AS FOLLOWS:

1. **Fifth Cause of Action, Procedural Due Process (California Constitution) and Sixth Cause of Action, Procedural Due Process (U.S. Constitution)**

The adoption of a General Plan Amendment (GPA) is a legislative act not subject to procedural due process claims (Clark v. City of Hermosa Beach (1996) 48 Cal.App.4th at 1180). Although in the land use planning and development review arena the consideration and adoption of a GPA may be intrinsically related to a specific project or proposal, it remains a discretionary act.

The demurrer as to the Fifth and Sixth Causes of Action is SUSTAINED WITHOUT LEAVE TO AMEND.

2. Seventh Cause of Action, Substantive Due Process (California Constitution) and Eighth Cause of Action, Substantive Due Process (U.S. Constitution)

A legislative act will withstand a substantive due process challenge if the government involved "identifies a legitimate state interest that the legislature could rationally conclude was served by the statute" (*Alexander v. Whitman*, 114 F.3d 1392, 1403 (3d Cir. 1997)). In the instant case, assuming the act complained of is legislative, it is rationally related to regulating growth and land use in the City. The fact that reasonable persons could disagree as to the wisdom or effectiveness of the act in question supports the conclusion that there is a rational basis for it. If we assume the act complained of is non-legislative in nature, Plaintiff does not have a sufficient property interest to support a claim for a violation of substantive due process (*Breneric Associates v. City of Del Mar*, 69 Cal.App.4th 166, 182-183)

The demurrer as to the Seventh and Eighth Causes of Action is SUSTAINED WITHOUT LEAVE TO AMEND.

3. Ninth Cause of Action, Denial of Equal Protection (California Constitutional) and Tenth Cause of Action, Denial of Equal Protection (U.S. Constitution)

To successfully state a cause of action for denial of equal protection, Plaintiff must allege that Defendants' demand for kit fox mitigation was not imposed on similarly situated property and that there is no rational basis for such disparate treatment (*Kawaoka v. City of Arroyo Grande* (1994) 17 F.3d 1227). The allegations of the petition (e.g., Paragraph 34), although close, fall short in this regard.

The demurrer as to the Ninth and Tenth Causes of Action is SUSTAINED WITH LEAVE TO AMEND,

4. Eleventh Cause of Action (Inverse Condemnation) and Twelfth cause of Action (Just Compensation)

Defendants' demurrer to these causes of action is based on an alleged lack of ripeness. Plaintiff has failed to adequately refute this position. Plaintiff may raise this claim at a later date.

The demurrer as to the Eleventh and Twelfth Causes of Action is SUSTAINED WITHOUT LEAVE TO AMEND.

5. Thirteenth Cause of Action (U.S.C. Title 42, Section 1983)

This statute is a procedural platform for alleging a violation of a right arising out of the U.S. Constitution. In land use matters, this means the regulation in question is a taking without payment of just compensation, a violation of substantive or procedural due process, a denial of equal protection or an interference with access to federal or state

courts. As noted above, such violations have not yet been plead.

The demurrer as to the Thirteenth Cause of Action is SUSTAINED WITH LEAVE TO AMEND to the degree it can be pled consistent with the causes of action for denial of equal protection and is SUSTAINED WITHOUT LEAVE TO AMEND with respect to the fifth, sixth, seventh, eighth, eleventh and twelfth causes of action.

6. Motion to Strike

The State has brought this motion attacking Plaintiff's claim for attorney fees. Based on this Court's rulings on demurrer, the motion is DENIED.

DATED: 6-9-02

/s/ Roger T. Picquet
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

Case No. CV 010860

[Filed, May 6, 2002]

JACK MUNARI,	)
Plaintiff,	)
	)
v.	)
	)
CITY OF EL PASO DE ROBLES et al.,	)
Defendant.	)
	)

RULING ON DEMURRER

This matter was submitted on April 11, 2002 after extensive briefing and argument. The Court, having fully considered all papers on file and the arguments of counsel, now rules as follows:

The Plaintiff filed a "First Amended Verified Petition for Writ of Mandamus or Alternatively, for Writ of Mandate; Complaint for Declaratory Relief and Damages for Violation of Civil Rights; Inverse Condemnation; Takings" on February 1, 2002. This petition is quite comprehensive and sets forth a series of detailed allegations pertaining to the efforts of Plaintiff to develop an area known as the "Chandler Ranch" located within the City of Paso Robles. The petition sets out thirteen (13) claims and an entitlement to attorney fees as

against the City and the State. The instant demurrer is brought by the City and the State to causes of action 5-13.

I. FIFTH CAUSE OF ACTION, PROCEDURAL DUE PROCESS (CALIFORNIA CONSTITUTION) AND SIXTH CAUSE OF ACTION, PROCEDURAL DUE PROCESS (U.S. CONSTITUTION)

The adoption of a General Plan Amendment (GPA) is a legislative act not subject to procedural due process claims (*Clark v. City of Hermosa Beach*(1996) 48 Cal.App.4th at 1180). Although in the land use planning and development review arena the consideration and adoption of a GPA may be intrinsically related to a specific project or proposal, it remains a discretionary legislative act.

The demurrer as to the Fifth and Sixth Causes of Action are sustained without leave to amend.

II. SEVENTH CAUSE OF ACTION, SUBSTANTIVE DUE PROCESS (CALIFORNIA CONSTITUTION) AND EIGHTH CAUSE OF ACTION, SUBSTANTIAL DUE PROCESS (U.S. CONSTITUTION)

A legislative act will withstand a substantive due process challenge if the government involved "identifies a legitimate state interest that the legislature could rationally conclude was served by the statute," (*Alexander v. Whitman* 114 F.3d 1392, 1403, 3d Cir. 1997). In the instant case, assuming the act complained of is legislative, it is rationally related to regulating growth and land use in the City. The fact that reasonable persons could disagrees to the wisdom or effectiveness of the act in question supports the conclusion that there is a rational basis for it. If we assume the act complained of is non-legislative in nature, Plaintiff does not

have a sufficient property interest to support a claim for a violation of substantive due process (*Breneric Associates v. City of Del Mar* 69 Cal.App.4th 166, 182-183).

The demurrer as to the Seventh and Eighth Causes of Action is denied without leave to amend.

III. NINTH CAUSE OF ACTION, DENIAL OF EQUAL PROTECTION(CALIFORNIA CONSTITUTION) AND TENTH CAUSE OF ACTION, DENIAL OF EQUAL PROTECTION (U.S. CONSTITUTION)

To successfully state a cause of action for denial of equal protection, Plaintiff must allege that Defendants' demand for kit fox mitigation was not imposed on similarly situated property and that there is no rational basis for such disparate treatment (*Kawaoka v. City of Arroyo Grande* (1994) 17 F.3d 1227). The allegations of the petition (e.g., Paragraph 34), although close, fall short in this regard.

The demurrer to the Ninth and Tenth Causes of Action is sustained with leave to amend.

IV. ELEVENTH CAUSE OF ACTION (INVERSE CONDEMNATION)AND TWELFTH CAUSE OF ACTION (JUST COMPENSATION)

Defendants demurrer to these causes of action based on an alleged lack of ripeness. Plaintiff has failed to adequately refute this position. Plaintiff, of course, preserves the right to raise this claim at a later date.

The demurrer to the Eleventh and Twelfth Causes of Action is sustained without leave

V. THIRTEENTH CAUSE OF ACTION (U.S.C. TITLE 42, SECTION 1983)

This statute is a procedural platform for alleging a violation of a right arising out of the U.S. Constitution. In land use matters, this means the regulation in question is a taking without payment of just compensation, a violation of substantive or procedural due process, a denial of equal protection or an interference with access to federal or state courts. As noted above, such violations have not yet been plead.

The demurrer to the Thirteenth Cause of Action is sustained with leave to amend to the degree it can be plead consistent with causes of action for denial of equal protection.

VI. MOTION TO STRIKE

The State has brought this motion attacking Plaintiff's claim for attorney fees. Based on the above rulings on demurrer, the motion is denied.

City to prepare an order in conformance with this ruling

Dated: May 6 , 2002

/s/ Roger T. Picquet
Judg of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

Case No. CV 010860

[Filed April 17, 2003]

JACK MUNARI,	)
Plaintiff,	)
	)
v.	)
	)
CITY OF EL PASO DE ROBLES, a municipal corporation, CITY COUNCIL OF THE CITY OF EL PASO DE ROBLES PLANNING COMMISSION OF THE CITY OF EL PASO DE KOBLES, ROBERT LATA, in his official capacity as) Community Development Director of PLANNING DEPARTMENT) OF THE CITY OF EL PASO DE ROBLES, CALIFORNIA DEPARTMENT OF FISH AND GAME, and Does 1 through 100, inclusive,	)
Defendants.	)
	)

ORDER ON MOTION FOR SUMMARY ADJUDICATION OF THE FIRST, SECOND, THIRD, FIFTH, SIXTH AND SEVENTH CAUSES OF ACTION IN PETITIONER/PLAINTIFFS SECOND AMENDED COMPLAINT FOR WRIT OF MANDAMUS; COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES FOR VIOLATION OF CIVIL RIGHTS

The motion for summary adjudication by the City of El Paso de Robles on the first, second, third, fifth, sixth and seventh causes of action came on regularly for hearing before this Court on December 12, 2001 William S. Waiter, Esq. appeared on behalf of the Plaintiff, Iris P. Yang, Esp. of McDonough, Holland & A11en appeared on behalf of Defendant City of El Paso de Robles.

The Court having considered the moving and opposing papers, including all evidence in support thereof and objections made thereto and oral argument and the matter having been submitted, issued and filed its Decision on Motion for Summary Adjudication on March 11, 2003, a copy of which is on file in this matter.

IT IS HEREBY ORDERED AS FOLLOWS:

First Cause of Action

The Court deems this cause of action to have been brought under Public Resources Code section 21168.5. It is a fundamental axiom of California land use that the adoption or amendment of a general plan is a legislative or quasi-legislative process. *City of Chula Vista v. Superior Court* (1982) 133 Cal.App.3d 472, 183 Cal.Rptr. 909. Judicial review of a quasi-legislative action is pursuant to CCP §1085

as is any related CEQA determination. In such a proceeding the substantial evidence standard applies. In negative declaration cases the substantial evidence test is turned around, however. The agency must require an EIR if it is presented with substantial evidence supporting a fair argument that significant environmental impacts may result from a project, even though there is also substantial evidence in the record to the contrary.

The Court sustains Petitioner's objection as hearsay to Fact #5 in the City's separate statement. However, this is not an operative fact but merely a background fact that places the true operative facts in a certain context. This fact is irrelevant to the issue of whether the city was required to do an EIR before adopting the SP requirement. Petitioner relies on *Fail River Wild Trout Foundation v. Co. of Shasta* (1999) 70 CA 4th 482. The Court finds defendant's arguments in opposition to the *Fail River* claim of petitioner to be more persuasive.

Plaintiff alleges that defendant "prejudicially abused its discretion in segmenting the environmental review of the Chandler Ranch specific plan" and cites *Bozung v. LAFCO* (1975) 13 C.3d 263. The Court finds *Bozung* readily distinguishable from this dispute. In *Bozung*, LAFCO simply ignored the requirements of CEQA and the Supreme Court held that an annexation was a project and therefore within the scope of CEQA. Defendant herein acknowledged that the proposed amendment to the GP was a project but concluded that the project qualified for a negative declaration.

The City defends its decision to use a negative declaration by pointing out that requiring a specific plan changed nothing.

> "The specific plan requirement does not change the already existing allowable uses, nor does it authorize

> any new, not yet approved development. No development was approved. No entitlements for development were granted. No land use or zoning designation was changed. All it did was require the adoption of specific plan before any development could occur."

In fact the property was previously subject to a specific plan requirement. The amendment merely restored a specific plan requirement to the area.

The Petitioner has not cited any evidence, let alone substantial evidence supporting a fair argument that the amendment, standing alone, may have a *significant* effect on the environment. It is hard to imagine how an amendment calling for a Specific Plan to "help insure orderly growth and development within the boundaries of the specific plan area" by avoiding "premature subdivision and piece-meal development," and contemplating buyer environmental review could have a significant effect on the environment or constitute "segmenting."

Summary adjudication in favor of the City/s GRANTED on petitioner's first cause of action.

Second Cause of Action

This challenges the City's adoption of the SP for a number of reasons other than alleged non-compliance with CEQA. The City argues that the petitioner lacks standing because he no longer holds an option to purchase the Chandler Ranch. Petitioner admits that he does not hold an option to purchase the property (Petitioner's memo of Points and Authorities p. 21:28).

The City relies on the very recent case of *Munari v. County* (2001) 90 Cal.App.4th 288. The facts described there are similar to the facts of the case at bar. Munari owned certain rural land that he claimed had been legally subdivided into 577 legal lots, prior to enactment of the Subdivision Map Act. He was unsuccessful in persuading the County to issue certificates of compliance for these lots, Munari sued the County. Four days after the action was filed Munari lost the property via a nonjudicial foreclosure.

The trial court granted Munari's motion for summary adjudication on his mandamus and declaratory relief causes of action. It ruled that subdivision maps, recorded prior to the enactment of the Subdivision Map Act of 1893, created valid lots; that the lots are specifically protected by the Subdivision Map Act;, and that the county was obliged, therefore, to issue certificates of compliance for all 577 lots. The trial court found that Munari had standing because in order for him to obtain damages for inverse condemnation, "he must first establish by ...administrative mandamus that the administrative decision is invalid." It issued an interlocutory order granting a writ of mandate directing that the county set aside its denial of the certificates of compliance.

The County filed a petition for writ of mandate and the Court of Appeals found Munari did not have standing because he no longer held title to the property and issued a writ directing the trial court to vacate its order granting summary adjudication on Munari's administrative mandamus and declaratory relief causes of action and to enter a new order denying Munari's motion for writ relief. The petitioner's efforts to argue around *Munari* are not persuasive. The same reasoning used by the Court of Appeal in *Munari* is applicable to this situation.

Summary Adjudication in favor of the City is GRANTED on petitioner's second cause of action.

Third Cause of Action

The petitioner seeks a judicial declaration that the City acted illegally and unconstitutionally in allegedly delaying the hearing on his proposed master plan and subsequently adopting the SP requirement. The petitioner offers only token opposition to the City's arguments as to why he is not entitled to declaratory relief. In addition, the availability of another form of relief that is adequate will usually justify refusal to grant declaratory relief. *C.J.L. Construction v. Universal Plumbing* (1993) 18 Cal-App.4th 376, 390. The petitioner's equal protection and section 1983 claims incorporate by reference all the allegations, of the preceding paragraphs of his petition/complaint including the third cause of action. Therefore, the petitioner's claim for declaratory relief is redundant.

Furthermore, without standing, it is difficult to see how a declaration that the City acted illegally would benefit Petitioner. He has no interest in the property.

Summary Adjudication in favor of the City is GRANTED on plaintiff's third cause of action.

Fifth, Sixth and Seventh Causes of Action

These go beyond attacking the adoption of the SP requirement. These causes of action allege that such an act was merely the final step in a continuing course of bad faith conduct by the City that was intended to delay, bind and frustrate plaintiff's development efforts. A claim for money damages cannot be based on Article 1, section 7 of the

California Constitution. *Gates v. Superior Court* (1995) 32 Cal.App.4th 481, 516-525, 38 Cal.Rptr.2d 489. Therefore, the only relief that Munari can get is equitable, i.e. a declaration that the City did improper or wrongful things to him and an injunction enjoining the City from continuing to engage in the illegal conduct. However, just like the requested relief in connection with his petition for writ of mandate, Munari has no standing. Without an ownership interest in The Chandler Ranch the requested equitable relief accomplishes nothing as to him

The sixth cause of action requires a somewhat different analysis because money damages even if nominal are allowed for a violation of the equal protection clause of the fourteenth amendment. Because he failed to challenge by administrative mandate the City's denial of his master plan, he is barred from pursuing his federal civil rights claim. *Breneric Associates v. City of Del Mar* (1998) 69 Cal-App.4th 166, 81.Cal.Rptr2d 324, *Mola Development Corp. v. City of Seal Beach (1997) 57* Cal.App.4th 405, 410. Even if this court considered only the City's conduct following denial of Munari's application for approval of his master plan, Munari still can't prevail bemuse he lacks standing under *Munari v. County (2001)* 90 Cal.App.4th 288.

42 USC §1983 simply, serves as a procedural platform for alleging a violation of some right arising from the federal constitution. In the context of land use, this means an allegation that the regulation is a taking without the payment of just compensation, a violation of substantive or procedural due process, a denial of equal protection, or an interference with access to federal or state courts. (See, USE OF THE CIVIL RIGHTS ACT TO RECOVER DAMAGES IN LAND USE CASES (1999) SE 18 ALI-ABA 497, 559,) Because Munari is barred from pursuing his equal protection claim he

has faded to state a cognizable claim arising under the federal constitution.

Summary Adjudication in favor of the City is GRANTED on plaintiff's fifth, sixth and seventh causes of action.

DATED: 4-17-03

/s/ Roger T. Picquet
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

Case No. CV 010860

[Filed July 23, 2003]

JACK MUNARI,
Plaintiff,

v.

CITY OF EL PASO DE ROBLES, a municipal corporation, CITY COUNCIL OF THE CITY OF EL PASO DE ROBLES PLANNING COMMISSION OF THE CITY OF EL PASO DE KOBLES, ROBERT LATA, in his official capacity as Community Development Director of PLANNING DEPARTMENT OF THE CITY OF EL PASO DE ROBLES, CALIFORNIA DEPARTMENT OF FISH AND GAME, and Does 1 through 100, inclusive,
Defendants.

ORDER GRANTING SUMMARY ADJUDICATION ON MOTION BY DEFENDANT CALIFORNIA DEPARTMENT OF FISH AND GAME AS TO THIRD, FOURTH, FIFTH AND SIXTH CAUSES OF ACTION IN SECOND AMENDED PETITION AND COMPLAINT

The motion for summary adjudication by defendant California Department of Fish & Game as to the third, fourth, fifth and sixth causes of action of the Second Amended Petition and Complaint was heard on March 5, 2003, William Walter appeared for petitioner and plaintiff. Gregory Newmark and Paul C. Epstein appeared for respondent and defendant California Department of Fish & Game. ("CDFG") The motion was argued and submitted, and the Court now rules as follows:

Procedural History

Petitioner, Jack Munari ("Munari"), filed a second amended petition for a writ of mandamus or, alternatively, declaratory and injunctive relief and damages ("petition"). After the filing of the second amended complaint but before the filing of this motion for summary judgment, defendants City of El Paso de Robles, City Council of the City of El Paso de Robles, Planning Commission of the City of El Paso de Robles, and Robert Lata (collectively, "City") filed a motion for summary adjudication which was granted by the court on March 11, 2003 as to all causes of action against the City. As a result, the only remaining defendant in the action is CDFG, which is named as a defendant in the third, fourth, fifth and sixth causes of action of the petition.

Allegations Against CDFG

The petition is 39 pages long. It alleges, in considerably more detail, the following facts: Munari is a developer who had an interest in an approximately 900 acre property referred to as the Chandler Ranch. In 1999 Munari submitted an application to the City for approval of a master plan for the Chandler Ranch, and spent more than $240,000 for an EIR. However, the City refused to schedule a public hearing on Munari's master plan and EIR until Munari executed a kit fox mitigation agreement satisfactory to CDFG. The agreement required by CDFG imposed excessive burdens on Munari, but he eventually signed it under duress in order to obtain a hearing. In June, 2001, the City certified the final EIR but did not approve Munari's master plan. Munari undertook further development efforts, but such efforts were thwarted to the City's adoption of a general plan amendment (GPA 3-01) which established a specific plan for Chandler Ranch.

The gravamen of the allegations against CDFG is that it acted unreasonably in requiring a mitigation agreement before the City would schedule a hearing; also, that both in this particular instance and as a general pattern and practice, CDFG fails to perform its functions within the time limits set by CEQA.

Undisputed Statement of Facts

For purposes of this motion for summary judgement the essential facts pled in the petition are not disputed. As the request of *CDTG* the court has taken judicial notice that Munari's interest in the Chandler Ranch was as an optionee, the option terminated on September 11, 2001, and after that date Munari ceased to have any legal or beneficial interest in the Chandler Ranch. Munari filed evidentiary objections to a

Declaration of Scott Flint in support of the motion for summary judgment. Those objections are sustained.

Third Cause of Action (Declaratory Relief)

In the third cause of action Munari alleges that an actual controversy exists between him and CDFG; namely, Munari contends, and CDFG allegedly denies, that CDFG acted illegally and unreasonably when it required Munari to enter into a kit fox mitigation agreement as a condition precedent to the City scheduling a hearing on the Chandler Ranch Master Plan and Final EIR. Munari also contends that CDFG's actions denied him his right to a timely hearing on the master plan and EIR. He asks for a declaration from the court that CDFG's actions were illegal, arbitrary and unreasonable.

The option formerly held by Munari expired, and he currently has no legal or beneficial interest in the Chandler Ranch. Therefore, there can be no declaration of existing rights and duties between Munari and CDFG with respect to Chandler Ranch. Any such declaration would merely be an advisory opinion of what Munari would be entitled to do it he were to have a beneficial interest in Chandler Ranch. Code of Civil Procedure section 1061 states: "The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under the circumstances."

Summary adjudication in favor of CDFG is granted on petitioner's third cause of action.

Fourth Cause of Action
(Declaratory Relief re Pattern and Practice)

In the fourth cause of action Munari seeks a declaration that when CDFO is acting as a trustee agency under CBQA, it has a mandatory duty to perform its functions within the same time limits established by CEQA. Munari further alleges that it is the pattern and practice of the CDFG to disregard those mandatory, time limits, and he seeks a declaration to that effect.

In support of his position that a court can grant declaratory relief regarding the legality and validity of an agency's pattern and practice, Munari cites *Californians For Native Salmon And Steel Association v. Department of Forestry* (1990) 221 Cal. App.3d 1419. In *Californians for Native Salmon*, the issue was not a specific agency decision. The complaint sought declaratory relief based upon plaintiff's allegations that the Department of Forestry had an established policy of ignoring or violating applicable laws and regulations in its approval of timber harvest plans. The court held that an actual controversy existed regarding the validity of the Department's policies and conduct, and that it was ripe for judicial resolution. The controversy was capable of a final, meaningful resolution because the Department was the body charged with approving the timber harvest plans, and a court declaration resolving the validity of the alleged conduct and policies would avoid piecemeal litigation of numerous challenges to other timber harvest plan approvals.

Unlike the present case, the issue before the court in *Californians For Native Salmon* was whether the facts alleged in the complaint were sufficient to survive a demurrer. In support of its allegation of an established pattern and practice, the complaint referred to "countless timber harvest plans" and

"numerous instances" where mandated procedure, had not been followed, and listed 65 approved plans to illustrate the alleged pattern and practice. (*Californians For Native Salmon And Steelhead Association v. Department of Forestry*, supra. p. 1425.) In the present case the sufficiency of the allegation to survive a demurrer is not in issue. The issue is the sufficiency of the evidence to support the allegation of a pattern and practice; i.e., whether there is a triable issue of fact. Munari does not present evidence of any instance, other than his own situation, to support his allegation that CDFG has an established pattern and practice to ignore CDFG time limits. In his Separate Statement of Undisputed Material Facts and Statement of Other Material Facts in Dispute, Munari does not include any facts in support of his fourth cause of action. He goes directly from fact no. 21, which is in support of the third cause of action, to fact no. 22 which is in support of the fourth and sixth causes of action.

The CEQA time limit applicable to CDFG, when it is acting as a trustee agency and submitting suggested mitigation measures, is that due mitigation measures are to be submitted "prior to the close of the public review period." (Public Resources Code section 21081.6(c).) That time limit is directory and not mandatory. *Meridian Ocean Systems Inc., v. State Lands Commission* (1990) 222 Cal.App.3d 153, 168.

The compliance or non-compliance with the time limit by a trustee agency does not limit the authority of the lead agency to approve, condition or deny projects. (Public Resources Code section 21081.6(c).) In *California For Native Salmon* the Department was charged with approval of the timber harvest plans; consequently, its "pattern and practice" had an important and direct effect on each plan subject to its approval. In contrast, CDFG does not have approval authority, and the impact of its procedures in making

mitigation recommendations can vary significantly from project to project. In such circumstances, declaratory relief is not appropriate. *BKHN Inc. v. Department of Health Services* (1992) 3 Cal.App,4th 301.

Summary adjudication in favor of CDFG is granted on petitioner's fourth cause of action.

Fifth Cause of Action (Violation of Equal Protection Under the California Constitution)

In the Fifth cause of action Munari seeks injunctive and declaratory relief based on allegations that CDFG, in violation of the California Constitution, intentionally treated him differently than other similarly situated persons. The disparate treatment of which Munari complains in the petition relates to the Chandler Ranch.

Injunctive and declaratory relief cannot affect or change past acts, rights or duties. If the fifth cause of action is interpreted as seeking equitable relief applicable to existing or future acts, rights and duties relating to the Chandler Ranch, Murani has no standing because he has no legal or beneficial interest in the property. If the fifth cause of action is interpreted as being directed as Munari's acquisition of as yet unknown properties at some unknown time in the future, it is too uncertain and speculative to declare what rights and duties will pertain to those unknown properties.

Munari asserts in his Separate Statement of Undisputed Material Facts and Statement of Other Material Facts in Dispute that he is not seeking monetary damages in the fifth cause of action (statement no. 1), Munari's statement is consistent with the law, Neither the language nor the legislative history of Article I, section 7(a) [due process,

equal protection] disclose any intent to authorize damage as a remedy for violation, and there are no guidelines, mechanisms or procedures from which a damage remedy might be inferred. *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300.

Summary adjudication in favor of CDPG is granted on petitioner's fifth cause of action.

Sixth Cause of Action (Violation of Equal Protection Under the United States Constitution)

In the sixth cause of action Munari alleges that CDFG intentionally treated him differently than other similarly situated persons, and that such treatment was in violation of the United States Constitution. Munari seeks injunctive and declaratory relief, but does not seek monetary damages (see statement no. 3 of Munari's Separate Statement of Undisputed Material Facts and Statement of Other Material Facts in Dispute). The acts of which Munari complains arose in connection with his proposed development of Chandler Ranch property. Because he no longer has any legal or beneficial interest in Chandler Ranch, he has no standing to obtain injunctive or declaratory relief to protect development of the ranch. As noted above in the discussion of the fifth cause of action, if the requested equitable relief is directed at Munari's acquisition of as yet unknown properties at some unknown time in the furore, it is too uncertain and speculative to declare what rights and duties will pertain to those unknown properties.

Summary adjudication in favor of CDFG is granted on petitioner's sixth cause of action.

DATED: 7-23-03

/s/ Douglas Hilton
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

Case No. CV 010860

[Filed, July 10, 2003]

JACK MUNARI, Petitioner and Plaintiff,	)
v.	)
CITY OF EL PASO DE ROBLES et al., Respondents and Defendants.	)

On April 3, 2003, Plaintiff requested a specific written ruling on certain evidentiary objections made in connection with the Defendant, City of El Paso De Robles' Motion for Summary Adjudication heard on December 12, 2002. The Court complies with the request as follows:

Declaration of Bob Lata

1. Paragraph 2, page 2, lines 12-16: OBJECTIONS; Relevance, vagueness. **OVERRULED**

2. Paragraph 3, page 2, lines 19-25: OBJECTIONS; Relevance, foundations, lack of qualifications, lack of foundation, improper opinion. **OVERRULED**

3. Paragraph 4, page 2, lines 26-34: OBJECTIONS; Lack of foundation, lack of qualifications. **OVERRULED**

4. Paragraph 6, page 3, lines 9-12: OBJECTIONS; Lack of Foundation, hearsay, relevance and improper legal conclusion. **GRANTED** as to hearsay, **OVERRULED** on all other grounds. However, this is really merely a background fact intended to give context. Plaintiff's exclusion as hearsay does not affect the Court's ultimate findings or decision.

5. Paragraph 7, page 5, lines 13-14: OBJECTIONS; Lack of foundation, best evidence rule **OVERRULED**

6. Paragraph 9, page 3, lines 22-27: OBJECTIONS; Argumentative, improper opinion, lack of foundation. **OVERRULED**

7. Paragraph 10, page 4, lines 1-7: OBJECTIONS; improper opinion, lack of foundation, improper conclusion **OVERRULED**

8. Paragraph 11 , page 4, lines 8-11: OBJECTIONS; Lack of Foundation and relevance **OVERRULED**

9. Paragraph 12, page 4, lines 12-16: OBJECTION; Relevance

10. Paragraph 13, page 4, lines 18-26 and, in general, paragraphs 13-21; OBJECTIONS; Relevance, lack of foundation, improper opinion and best evidence **OVERRULED**

The Court finds that Mr. Lata, as the City's Director of Community Development is qualified to make the statements objected to and referenced above due to his position.
DATED: July 10, 2003

/s/ Roger T. Picquet
Superior Court Judge

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FILED
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No. 05-314

In The
Supreme Court of the United States

JACK MUNARI,

Petitioner,

v.

CITY OF EL PASO DE ROBLES, A Municipal Corporation, CITY COUNCIL OF THE CITY OF EL PASO DE ROBLES, ROBERT LATA, in his official capacity as Community Development Director of PLANNING DEPARTMENT OF THE CITY OF EL PASO DE ROBLES, STATE OF CALIFORNIA, CALIFORNIA DEPARTMENT OF FISH AND GAME and DOES 1 through 100 inclusive,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District

BRIEF IN OPPOSITION

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondents the City of El Paso de Robles, City Council of the City of El Paso de Robles, and Robert Lata, in his official capacity as Community Development Director for the City of El Paso de Robles Planning Department (collectively "the City") respectfully request that this Court deny the petition for writ of certiorari, seeking review of the California Court of Appeal's unpublished opinion in this case, on which the California Supreme Court already denied review.

As set forth in the state Court of Appeal's unpublished opinion, Petitioner held an option to purchase the Chandler Ranch, a 673-acre property subject to a general plan that permitted no more than 250 residential dwelling units. Petitioner submitted an application to amend the general plan along with a proposal to develop 1,226 dwelling units. Contrary to Petitioner's allegations, the City held a hearing on June 19, 2001 at which it certified the Environmental Impact Report but denied the application, finding that development at densities consistent with the general plan was environmentally preferred. Petitioner did not challenge this decision, but instead chose to subdivide one of the parcels on the property. The City, wishing to avoid piecemeal development of the Chandler Ranch, adopted a general plan amendment requiring a specific plan be prepared before it would consider development proposals for this property. Petitioner failed to proceed with his subdivision proposal and let his option expire several days later. As a result, the City never acted on Petitioner's second subdivision proposal. Petitioner then filed the instant action in the superior court alleging

inverse condemnation, taking without just compensation, and violations of his due process and equal protection rights.

Both the trial court and the state Court of Appeal applied well-established law to deny Petitioner's claims. As discussed below, Petitioner blatantly misrepresents the Court of Appeal's holdings. Petitioner asserts that the Court of Appeal applied the two prongs of the ripeness doctrine set forth in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) to dismiss his substantive and procedural due process, equal protection and temporary takings claims under 42 U.S.C. § 1983. In fact, as to Petitioner's taking claims, the court held that Petitioner failed to satisfy the most basic ripeness requirement – a "final determination." Petitioner only submitted one development application which required significant land use changes that the City declined to approve. Petitioner never pursued his second application. Because there was no final determination on the extent of permitted development, the court was precluded from determining whether the development requirements constituted a taking. To the extent Petitioner claimed damages for an alleged delay in certifying the Environmental Impact Report (the "EIR"), the court found that Petitioner's failure to seek mandate was fatal. Once the EIR was certified, Petitioner's claims became moot, according to the Court of Appeal. Moreover, Petitioner's equal protection claims were denied on the merits without reference to *Williamson County*'s ripeness test.

Petitioner also incorrectly alleges that he was denied standing to pursue his state law remedies on the grounds his option rights had expired. The Court of Appeal held that regardless of the standing issue, Petitioner's claims

failed on the merits. (Pet. for Cert., App. C at 13a-14a.) As such, this case was correctly decided without regard to the irrelevant questions Petitioner seeks to have addressed here.

The City provides the following overview to correct the numerous misstatements by Petitioner.

A. Factual Background

The Chandler Ranch is a 673-acre property which includes the most extensive oak woodland in the City and is surrounded by steep hillsides. Additionally, the Chandler Ranch is a potential habitat for the San Joaquin kit fox, a species protected by state and federal law. On August 18, 1998, the City adopted a general plan amendment removing a specific plan requirement that included Chandler Ranch.[1] Prior to this amendment, the Chandler Ranch property was covered by the Chandler Ranch Specific Plan Overlay Land Use Category. In 1999, Petitioner submitted an application for development of the Chandler Ranch (the "Master Plan Application"), which included a general plan amendment, zoning ordinance amendment and permits to develop 1,226 dwelling units,

[1] A general plan is a comprehensive land-use plan for the physical development of the City, which state law requires ever city to prepare and adopt. Cal. Gov't Code §§ 65300-65404; *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1229 (9th Cir. 1994). A specific plan is an optional planning tool that the City may use to implement a general plan. Cal. Gov't Code §§ 65450-65457; *Kawaoka*, 17 F.3d at 1230. Specific plans generally act as a policy statement, refining the general plan's policies with respect to a specific area and including information regarding the uses of land within the plan area and standards for developing that land. *Id.* The specific plan must be consistent with the general plan. Cal. Gov't Code § 65454.

along with commercial and industrial development. At that time, the General Plan limited potential development for Chandler Ranch to not more than 250 residential dwelling units. The City began the extensive environmental review process required under the California Environmental Quality Act ("CEQA"), Cal. Pub. Res. Code § 21000 et seq. On May 24, 1999, the City did not "deem" Petitioner's application complete as Petitioner alleges; rather, it issued a Notice of Preparation of a Draft EIR on Petitioner's Master Plan Application.

The environmental review process involved the consideration of three alternatives – no project, development at densities consistent with existing land use regulations, and Petitioner's proposed project. The Draft EIR was released on June 30, 2000. In response to the Draft EIR, the California Department of Fish and Game ("DFG") provided the City with guidelines for the mitigation of project-related impacts on the San Joaquin kit fox. This standard protocol required (1) mitigation of project impacts by either on-site open space preservation of kit fox habitat or setting aside off-site areas for kit fox protection; (2) the implementation of standard measures for kit fox protection; and (3) the securing of a mitigation agreement with DFG prior to certification of the Final EIR. In the meantime, Petitioner repeatedly requested that the City schedule a hearing before the Planning Commission to consider his Master Plan Application, despite the fact that the EIR had not yet been completed and he had not yet reached agreement with DFG on a kit fox mitigation plan. Consistent with DFG protocol, Petitioner finally entered into a kit fox mitigation agreement with DFG on June 11, 2001, which obligated Petitioner to either

purchase replacement habitat or pay an in-lieu fee if and when his Master Plan Application was actually approved.

On June 19, 2001, following completion of the Final EIR, the City Council held a public hearing on the Final EIR and the Petitioner's Master Plan Application. The Final EIR determined that the second alternative for development at densities consistent with the General Plan was environmentally preferred. The City certified the EIR, but denied Petitioner's application based upon the findings in the Final EIR.

Petitioner did not file a petition for writ of mandate challenging the City's denial. Nor did he subsequently propose a less-intensive development. Instead, he applied to subdivide one of the parcels within the Chandler Ranch. Petitioner's allegations that potential purchasers of property were told that the City would not consider approving any development proposals as long as Petitioner held an interest in the ranch are completely unfounded and are belied by the established facts that the City devoted a great deal of time and resources to Petitioner's Master Plan Application and subsequent subdivision proposal. (*See* Pet. for Cert. at 6.) Indeed, the City never reached any determination as to Petitioner's subsequent subdivision proposal. Rather, on September 4, 2001, the City amended its general plan to again require a specific plan be prepared before any development could be approved on the Chandler Ranch. The City determined that a specific plan was necessary to avoid piecemeal development of this important local resource. Petitioner's assertion that the specific plan imposed a "moratorium" on any development applications is patently incorrect. The City was only requiring that a specific plan be prepared for

Chandler Ranch before the City would further process development applications for that property.

Petitioner's option to acquire the Chandler Ranch expired on September 11, 2001. The owner of Chandler Ranch thereafter began working with the City to prepare a specific plan for the property. Again, Petitioner asserts unfounded allegations that the City purposefully delayed consideration of his application and required a specific plan to damage Petitioner's option rights, when in fact the City did not know that Petitioner's option term had expired until so informed by the property owner.[2]

B. Procedural Background

On October 4, 2001, Petitioner filed a combined petition for writ of mandate and complaint against the City and DFG. On February 1, 2002, Petitioner filed a First Amended Petition for Writ of Mandamus and Complaint ("FAP") alleging thirteen causes of action. The allegations included (1) violation of CEQA, (2) violation of Government Code requirements regarding the adoption of the General Plan amendment, (3) a request for declaratory relief alleging due process and equal protection violations and inverse condemnation, (4) violation of Petitioner's procedural due process, substantive due process and equal protection rights under the U.S. and California Constitutions, (5) inverse condemnation under the U.S. and California Constitutions and (6) a claim for damages under 42 U.S.C. § 1983.

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[2] Petitioner also incorrectly states that his option rights expired after he initiated litigation in the state superior court. Petitioner's option expired on September 11, 2001 nearly one month *before* he filed a combined petition for writ of mandate and complaint on October 4, 2001.

The City demurred to the causes of action alleging violation of State and Federal procedural due process, substantive due process, equal protection, and inverse condemnation and the cause of action for damages under 42 U.S.C. § 1983. The trial court (1) sustained the City's demurrer to the procedural due process, substantive due process and inverse condemnation claims without leave to amend, (2) sustained the City's demurrer to the equal protection claims with leave to amend and (3) sustained the City's demurrer to the section 1983 claim (thirteenth cause of action) with leave to amend with respect to the federal equal protection theory and without leave with respect to the other theories. (Pet. for Cert., App. D at 25a-33a.)

On May 31, 2002, Petitioner filed a Second Amended Petition and Complaint ("Second Amended Petition" or "SAP"). Petitioner alleged only six causes of action against the City. Specifically, the SAP re-alleged Petitioner's claims of (1) violation of CEQA, (2) violation of the Government Code sections regarding adoption of a general plan amendment, (3) request for declaratory relief claim, (4) violations of state and federal equal protection claims, and (5) damages under 42 U.S.C. § 1983.

On October 21, 2002, the City moved for summary adjudication with respect to each cause of action against the City. The trial court granted the City's motion in full on April 17, 2003. On October 6, 2003, the trial court entered judgment against Petitioner and in favor of the City with respect to all the causes of action alleged against the City in both the FAP and the SAP. (Pet. for Cert., App. D at 20a-24a.)

Prior to the entry of judgment, Petitioner filed a Notice of Appeal (June 16, 2003) and an Amended Notice of Appeal (September 2, 2003). On October 15, 2003, after the entry of judgment, Petitioner filed a Second Amended Notice of Appeal. On March 23, 2005, the Court of Appeal issued an unpublished opinion affirming the trial court judgment in full. (Pet. for Cert., App. C.)

On April 8, 2005, Petitioner submitted a petition for rehearing to the Court of Appeal. On April 18, 2005, the Court of Appeal issued an Order Modifying Opinion and Denying Rehearing [No Change in Judgment]. (Pet. for Cert., App. B.)

Petitioner thereafter petitioned for review with the California Supreme Court. The California Supreme Court denied Petitioner's Petition for Review on June 8, 2005. Petitioner now seeks review in this Court of the denial of his constitutional claims based upon an alleged conflict amongst state and the circuit courts of appeal as to the *Williamson County* ripeness test.

REASONS FOR DENYING THE PETITION

A. The Petition Does Not Address Petitioner's First Question.

Petitioner first asks whether state and local governments may impose an "exaction" like the kit fox mitigation agreement as a pre-condition to holding a hearing on his development application. Perhaps because the facts do not support his allegations, Petitioner never addresses this substantive question. The City nevertheless addresses the merits of his question out of an abundance of caution.

Petitioner's first question fails to establish the necessity of this Court's review for two key reasons. First, Petitioner ignores the fundamental rule that the City *may* "take" or regulate property for public use – the only question is whether such a taking requires the payment of just compensation. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."). The obvious answer to Petitioner's question is thus "yes," the City may impose such a condition.

Second, regardless of whether the mitigation agreement under different circumstances might constitute a taking or exaction, there has been no such taking here. The mitigation agreement was expressly contingent upon the approval of Petitioner's development application for Chandler Ranch. That development application was denied, and Petitioner did not challenge the City's denial of the application. He never paid any money for kit fox mitigation either before or after the June 19, 2001 City Council hearing. As the Court of Appeal noted, "the [mitigation] agreement was dependent on the City's approval of his master plan application. Whatever merit the argument may have had, it became moot when the City denied his application." (Pet. for Cert., App. B at 3a.) The mitigation agreement could not constitute an exaction and Petitioner has suffered no damages because Petitioner was never required to pay any money pursuant to that agreement.

B. Neither The Decision Below Nor The Record Raises The Questions Presented In The Petition.

Petitioner's remaining issues rest on the mistaken presumption that the Court of Appeal disposed of all of his constitutional claims based upon application of the first and second prong ripeness requirements in *Williamson County*. Petitioner asserts that review is necessary to resolve alleged inconsistencies between the state and federal courts as to the application of *Williamson County* to his constitutional claims. The state Court of Appeal, however, did not decide these questions in this proceeding. Moreover, the facts of record will not support a determination of these questions by the Court.

1. The State Court Of Appeal Denied Petitioner's Equal Protection Claims On The Merits; Thus *Williamson County*'s Ripeness Test And Any Alleged Court Split As To Its Application Are Irrelevant To This Case.

Petitioner's assertion that determination of whether the equal protection claims should be subject to the *Williamson County* ripeness tests generally applied to takings claims is irrelevant to the instant proceeding. The Court of Appeal did not dismiss Petitioner's equal protection claims on ripeness grounds. Rather, the Court of Appeal determined that whatever merit Petitioner's equal protection claim may have had with respect to the kit fox mitigation agreement, it became moot when the City denied his application because the agreement was expressly dependent on the City's approval of his master plan application. (Pet. for Cert., App. B at 3a.).

As to Petitioner's assertion that he was treated differently from other similarly-situated property owners when the City adopted a specific plan requirement for the Chandler Ranch, the Court of Appeal denied this claim on the merits. The Court of Appeal recognized that there were other properties within the City other than the Chandler Ranch that were also subject to a specific plan requirement. (Pet. for Cert., App. C at 18a.) Further:

> All other properties within the city that [Petitioner] claims are similar to the Chandler Ranch are significantly smaller. Two of the properties that [Petitioner] claims are similar are a 400-acre golf course and a 40-acre park. A golf course and a park are substantially different than [Petitioner's] proposed residential subdivision. The undisputed facts show that any difference in treatment between the Chandler Ranch and other parcels within the city has a rational basis. (Pet. for Cert., App. C at 18a.)

It is clear from the above holding that Petitioner's petition lacks the essential factual predicate of his question presented – i.e., a dismissal of his equal protection claims on ripeness grounds. Resolution of any alleged conflict regarding the application of *Williamson County*'s ripeness tests to equal protection claims will not provide any redress here. In essence, Petitioner seeks to have this Court render an impermissible advisory opinion.

2. Deciding The Question Presented Would Not Provide Any Relief For Petitioner With Respect To His Temporary Takings Claim.

a. There Is No Conflict As To The Application Of *Williamson County*'s Ripeness Tests To Temporary Takings Claims.

"It was settled well before *Williamson County* that 'a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.'" *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. ___, 125 S. Ct. 2491 (2005) (quoting *Williamson County*, 473 U.S. at 186). None of the cases Petitioner cites questioned the application of this final decision prong of the ripeness inquiry to temporary takings claims. Indeed, this Court's own recent decision in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 339-40 (2002) seems to have decided this issue, recognizing that the ripeness inquiry is applicable to *all* takings claims. In *Tahoe-Sierra*, this Court reiterated the "strict ripeness requirement" imposed on landowners asserting a regulatory takings claim. Requiring planners to compensate for alleged temporary takings before making a final decision would "create a perverse system of incentives" wherein "landowners must wait for takings claim to ripen so that planners can make well-reasoned decisions while, at the same time, holding that those planners must compensate landowners for the delay." *Id.* at 340. Stated another way, the ripeness inquiry is applicable to all takings claims; to hold otherwise would create absurd results. There is no conflict as to the application of the

Williamson County ripeness inquiry to temporary takings claims.

b. The State Court Of Appeal Denied Petitioner's Temporary Takings Claim On The Merits, And Thus *Williamson County*'s Ripeness Test And Any Alleged Court Split As To Its Application Are Irrelevant To This Case.

Alternatively, the Court of Appeal denied Petitioner's takings claims on the merits, holding that any delay in certifying the EIR was an ordinary delay in the planning process which did not preclude all beneficial use of his property. (Pet. for Cert., App. C at 10a) (quoting *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987), "We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us.").

3. There Is No Conflict Amongst The Courts Concerning The Application Of *Williamson County*'s Ripeness Tests To Due Process Claims Where, As Here, Such Claims Are Ancillary To A Takings Claim.

Petitioner again misrepresents the Court of Appeal's opinion as to his procedural and substantive due process claims. The Court of Appeal did not dismiss Petitioner's due process claims solely on the basis of the *Williamson County* ripeness requirements. The Court of Appeal recognized that Petitioner's due process claims were

simply a reiteration of his takings claim. As such, Petitioner was required to satisfy the *Williamson County* ripeness requirements. (Pet. for Cert., App. C at 12a.) (citing *Armendariz v. Penman*, 75 F.3d 1311, 1324-26 (9th Cir. 1996)). Although "certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands," this Court has instructed that plaintiffs may not "double up" constitutional claims in this way. *Armendariz*, 75 F.3d at 1320. Where a claim can be analyzed under "an explicit textual source" of rights in the Constitution, a court may not also assess the claim under another "more generalized" source. *Graham v. Connor*, 490 U.S. 386, 394-95 (1989).

a. Petitioner's Due Process Claims Simply Reiterate His Takings Claim, And Thus Are Subject To Traditional Ripeness Requirements.

Here, because the Fifth Amendment takings clause supplies an explicit textual source of constitutional protection when the government is alleged to have deprived a plaintiff of the economically beneficial use of his property, the takings clause and not the due process clause governs the constitutionality of the City's actions. Petitioner should not be permitted to avoid the ripeness requirements simply by recasting his claims as a due process violation. (Pet. for Cert., App. C at 12a.)

This Court in *Williamson County* determined that whether cast as a takings or a question of due process, a claim is premature if the essential argument, as here, is that a regulation "goes too far" as an invalid exercise of the police power. 473 U.S. at 199. Such an inquiry requires the court to resolve the same difficult issue of how to

define "too far." *Id.* Resolution of this question depends, as to a takings claim, in significant part upon an analysis of the effect of the government's actions and regulations on the value of the plaintiff's property and investment-backed investment expectations. *Id.* at 199-200. "That effect cannot be measured until a final decision is made as to how the regulations will be applied to [Petitioner's] property." *Id.* at 200.

No such final determination was made as to Petitioner's claims. The City denied Petitioner's Master Plan Application following a public hearing, but he never appealed this decision. The City never made any decision on his second application because his option expired before any decision could be made. The adoption of a general plan amendment requiring that a specific plan be submitted with development applications for the Chandler Ranch is irrelevant. The City has never made a final determination of the extent of permitted development. As in *Williamson County,* Petitioner's claims are premature, whether analyzed as a deprivation of due process under the Fourteenth Amendment, or as a taking under the Fifth Amendment's just compensation clause (made applicable to state and local governments through the Fourteenth Amendment).

The Court of Appeal's analysis comports with this Court's decisions applying the final decision ripeness test to due process claims where, as here, they are based upon the same set of facts and circumstances giving rise to the petitioner's takings claims. Contrary to Petitioner's assertions, the cases he cites do not conflict with this interpretation. These decisions reveal that the final determination rule is regularly applied to due process claims challenging the process by which officials reach

land use decisions as this Court instructed in *Williamson County*. *See, e.g., Taylor Inv., Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1293-94 (3d Cir. 1993); *Herrington v. County of Sonoma*, 857 F.2d 567, 569 n.1 (9th Cir. 1988); *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573-74 (11th Cir. 1989).[3] The only time the courts have refused to apply this strict ripeness test is where the due process claim is not ancillary to the takings claim. *See Warren v. City of Athens*, 411 F.3d 697, 708 (6th Cir. 2005). Only in this narrow situation, not relevant here, have the courts found *Williamson County* inapplicable. Accordingly, there is no conflict for this Court to resolve because it is well-settled that due process claims ancillary to a takings claim may not be used to avoid a ripeness inquiry.

b. Resolution Of The Question Presented Is Not Necessary Because Petitioner's Due Process Claims Fail Regardless Of Whether Or Not They Are Ripe Under *Williamson County*.

The Court of Appeal went on to address the merits of Petitioner's substantive due process claims related to the

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[3] Petitioner contends that in *Greenbriar Ltd. v. City of Alabaster*, 881 F.2d 1570 (11th Cir. 1989), the Eleventh Circuit, in dicta, "stated that it is 'not at all clear' that first prong ripeness should apply to a substantive due process claim premised upon arbitrary governmental action." Petition, 17-18. The Eleventh Circuit made no such statement. The Eleventh Circuit noted that it was "not at all clear" that this Court's re-application requirement for finality in *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986) was also required to satisfy the final determination standard for substantive due process claims, or that it applied in precisely the same manner. *Greenbriar, Ltd.*, 881 F.2d at 1576 n.11. The *Greenbriar* court never questioned the applicability of the final determination test under *Williamson County* to due process claims.

City's renewal of a specific plan requirement. The Court of Appeal recognized the uniqueness of the Chandler Ranch – 673 acres of the most extensive oak woodland in the City, surrounded by steep hillsides that present a significant challenge to vehicular access and development. (Pet. for Cert., App. C at 17a.) As the Court of Appeal concluded, "On its face, this is the type of parcel for which a specific plan can be beneficial. The City has a legitimate public interest in requiring a specific plan to preserve the parcel's natural resources and prevent piecemeal development." (*Id.*) (citing *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994)).

Similarly, Petitioner's procedural due process claims are without merit as Petitioner has not shown a liberty or property interest protected by the Constitution. Petitioner could not establish that he was deprived of a property interest, because the City retained substantial discretion in considering the Master Plan Application and General Plan Amendment requiring the specific plan. It is well-settled that general plan amendments and rezonings are legislative acts, over which the City has full discretion. *See, e.g., Yost v. Thomas* 36 Cal. 3d 561, 570 (1984); *Mitchell v. County of Orange* 165 Cal. App. 3d 1185, 1191-92 (1985).

In other words, Petitioner's due process claims rest on the bald assertion that he was denied all beneficial use of his property because the City delayed acting on his Master Plan Application before rejecting it. Such an assertion, however, is not supported by the facts or law. The City processed Petitioner's Master Plan Application in just two years from the date he claims it was "deemed complete." Given the substantial development proposed on a very

unique piece of property that required significant environmental review, such a delay did not amount to an unconstitutional deprivation of due process or a taking without just compensation. Petitioner had no entitlement to expedited processing of his application simply because his option was about to expire. Petitioner assumed the risk that his option might expire before the normal entitlement process ran its course, particularly when unique property was involved and the proposed development deviated significantly from existing approved uses. *See Mola Dev. Corp. v. City of Seal Beach*, 57 Cal. App. 4th 405, 416-17 (1997). As this Court recently explained in holding that a 32-month planning moratorium did not constitute a *per se* taking:

> The interest in facilitating informed decision-making by regulatory agencies counsels against adopting a *per se* rule that would impose such severe costs on their deliberations. Otherwise, the financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether.

Tahoe-Sierra Pres. Council, 535 U.S. at 339. This would, in turn, foster "inefficient and ill-conceived growth." *Id.*

Accordingly, even if there are conflicting decisions over the application of the final determination rule to due process claims stemming from land use decisions, resolution of such a conflict would not provide any relief to Petitioner because his due process claims fail regardless of whether or not they are ripe under *Williamson County*.

C. The Court Of Appeal's Decision Did Not Deny Petitioner Any Adequate State Law Remedies For His Constitutional Rights.

Petitioner's final question asks whether mandamus is a sufficient remedy to preclude recovery of damages under section 1983. Petitioner asserts that the Court of Appeal's denial of his claims for failure to pursue mandamus to compel the City to hold a hearing on the EIR and his Master Plan Application deprived him of a remedy under section 1983. Petitioner's question presented again grossly mischaracterizes the Court of Appeal's holding.

1. The Court Of Appeal Dismissed Petitioner's Claim On The Merits, And Thus Review Of State Law Mandamus Procedures Is Not Necessary.

The Court of Appeal did not deny Petitioner a remedy under section 1983. Petitioner ignores the fact that the Court of Appeal denied his takings claim regarding the alleged delay in certifying the EIR on the *merits*. The Court of Appeal recognized that any delay in certifying the EIR was one of the "normal delays" common in the planning process and did not deprive him of all economically beneficial use of his property. Delaying certification of the EIR "simply delayed consideration of one proposed economically beneficial use." (Pet. for Cert., App. C at 10a.) Petitioner still had the option of proposing a development plan in compliance with the then-existing zoning and general plan requirements for the Chandler Ranch. (*Id.*) (distinguishing *First English, supra,* 482 U.S. 304 (1987)). Only after determining this issue on the merits did the court go on to hold that Petitioner's takings claim was also subject to dismissal for failure to pursue a remedy in

mandate. (*Id.*) Again, Petitioner seeks to have this Court render an improper advisory opinion.

2. Alternatively, The Court Of Appeal's Decision Does Not Raise The Question Petitioner Now Presents To This Court Because Exhaustion Of Mandamus Procedures Merely Aids The Courts In Determining Whether A Taking Has Gone "Too Far," And Does Not Hamper Petitioner's Right To Seek Compensation Under Section 1983 If A Taking Has Indeed Occurred.

Even assuming *arguendo* that the Court of Appeal had not reached the merits of the claim, the Court of Appeal's decision on ripeness grounds does not raise the question Petitioner now presents to this Court. Although unclear, Petitioner seems to contend that the Court of Appeal imposed "unreasonable procedural impediments" to Petitioner's section 1983 claims by misapplying the second prong of the *Williamson County* ripeness test in holding that Petitioner should have exhausted the available remedy in mandate to compel the City to review the EIR. Again, Petitioner has missed the point.

A petition for writ of mandamus is not a state procedure for seeking compensation (i.e., a procedure that must be exhausted under the second prong of *Williamson County*). Rather, it is a procedure that must be utilized to reach a "final decision." Before the second prong of the *Williamson County* ripeness test is even considered, a petitioner must be able to show that there has been a "final decision" as to the extent to which the beneficial use of any property rights have been impaired by government

action. Petitioner has no remedies to pursue under section 1983 or through a state inverse condemnation claim for "just compensation," until there has been a "final decision" from which a reviewing court can first determine whether there was indeed a "taking." *Williamson County*, 473 U.S. at 191.

Here, the Court of Appeal correctly determined that Petitioner failed to satisfy even this first "final decision" prong by not first pursuing a remedy in mandamus. Under *Williamson County* and the California Supreme Court's decision in *Hensler v. City of Glendale*, 8 Cal. 4th 1 (1994), a final administrative decision is "one which [has afforded] the administrative agency and any reviewing body having similar authority the opportunity to amend the agency decision and/or grant a variance." *Hensler*, 8 Cal. 4th at 10-11. This means that Petitioner must first attempt to set aside a city's decision through a mandamus action before pursuing damages for a taking or any ancillary due process claims. *See Mola Dev. Corp.*, 57 Cal. App. 4th at 410. "Mandamus proceedings allow courts to flesh out the issues and factual components of the dispute, including issues of procedural fairness. Review by mandamus is necessary because a court 'cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes.'" *Id.* at 411.

Petitioner challenged the City's alleged delay in processing the EIR long after the City had certified the EIR. He cannot avoid the final determination requirement by simply waiting until his claim becomes moot. *Id.* at 418; *County of San Luis Obispo v. Superior Court*, 90 Cal. App. 4th 288, 295 (2001).

3. Irrespective Of *Williamson County*'s Second Prong Ripeness Requirement, Petitioner Has Failed To Satisfy Even The First Prong "Final Decision" Requirement.

In addition, Petitioner failed to seek a final decision on a development proposal at Chandler Ranch. Where, as here, the petitioner is not challenging the then-existing zoning or development requirements but merely has submitted one application seeking approvals for a more intensive development, this Court has generally held that the takings claim is not ripe. For example, in *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986), the county board of supervisors affirmed the county planning commission's rejection of a landowners' subdivision plan. Under the landowner's proposal, the property was to be subdivided into 159 single-family and multi-family residential lots. Although the property was zoned for residential use, the planning commission and board of supervisors rejected the plan because it failed to adequately account for public street access, sewer services, water supplies, and police protection. The landowner did not submit any other development plans and simply filed suit claiming his property rights had been "taken" without just compensation. This Court, however, determined that this single rejection did not constitute a taking. *Id.* at 352-53. In so holding, the Court pointed out that Petitioner had not attempted to obtain approval of a development in accordance with the applicable zoning regulations, and thus there had not yet been a "final determination" because no meaningful application had been made. *Id.* at 353. The possibility still existed that "some development [would] be permitted." *Id.* at 352.

As in *MacDonald*, the City only rejected one development application from Petitioner. Petitioner's Master Plan

Application would have required a general plan amendment and called for nearly five times the number of residential units permitted under the then-existing zoning regulations. "Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similar unfavorable reviews." *Id.* at 353, n.9; *see also Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104 (1978) (declining to find that application of state landmark preservation law effected a taking where committee had only disapproved of 50-story building and property owners had not sought approval for another plan); *San Diego Gas & Elec. Co. v. San Diego,* 450 U.S. 621 (1981) (dismissing appeal because it did not appear that city's rezoning and adoption of an open space plan had deprived utility of all beneficial use of its property).

The City's subsequent requirement that a Chandler Ranch specific plan be prepared did not ripen Petitioner's takings claims because the requirement did not prohibit development or operate as a moratorium. *See Selby Realty Co. v. City of San Buenaventura* 10 Cal. 3d 110, 118-19 (1973) (adoption of general plan amendment may not constitute a taking because it does not represent a final agency decision on the application of the city's land use regulations to the property at issue). The specific plan requirement does not change the already existing allowable uses, nor does it authorize any new, not yet approved development. No development was approved. No entitlements for development were granted. No land use or zoning designation was changed. All the City did was require the adoption of a specific plan before any development could occur. Petitioner let his option expire without submitting a specific plan, and therefore never received

a final determination of what development would be permitted.

CONCLUSION

Petitioner has vastly overstated the significance of *Williamson County* to the specific facts and decision in this case because the questions presented by Petitioner are more theoretical than factual. Petitioner has suffered no constitutional injuries. Petitioner made one development application to the City, which required several legislative acts, including a general plan amendment and rezoning. The City exercised its legitimate discretion in denying that application. The City then exercised its authority to require that a specific plan be prepared for Chandler Ranch. Petitioner submitted no new application and his option expired. No exactions were imposed on Petitioner, and no constitutional rights were violated. The Court of Appeal applied well-settled law to the specific facts of the present case. Its decision is unpublished. This case presents no unique facts and no new law. Therefore, this Court's review is unnecessary.

For all the foregoing reasons, the petition of certiorari should be denied.

Respectfully submitted,

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